

# ATTACHMENT B

### **EAST RIVER’S RESPONSIVE POSITION STATEMENT**

There was no interference with the examination of East River’s representatives. Instead, Dakota’s counsel repeatedly sought to invade the attorney-client privilege and ignored the Phase One limitations imposed by Judge Piersol. The deposition transcripts show that East River’s counsel’s conduct throughout the depositions was entirely proper.<sup>1</sup>

#### **A. Dakota’s Examination into Attorney-Client Communications**

Dakota argues that, by truthfully answering deposition questions, East River’s witness has somehow given Dakota the right to know—as to the issue of Dakota’s right to terminate the parties’ contract—“Did [East River’s] attorney suggest it was a close call or say a court might conclude otherwise?” (Pos. Stmt. at 2.) This is the paradigm of privileged information.

Dakota attempts to claim that East River waived privilege because East River has “offer[ed] its attorneys’ advice as support for its position.” (*Id.*) This is patently untrue. Mr. Ryken was asked if his interpretation of contract provisions was based solely on his own reading. He responded that he also relied on advice of counsel. This answer does not put advice of counsel at issue. *See Unitedhealth Grp. Inc. v. Columbia Cas. Co.*, No. 05-1289, 2010 U.S. Dist. LEXIS 153035, at \*66 (D. Minn. Aug. 10, 2010) (“[I]n order for the privilege to be impliedly waived, a party must rely on privileged advice of counsel in support of a claim or defense.”); *Baker v. GMC*, 209 F.3d 1051, 1055 (8th Cir. 2000); *Rhone-Poulenc Rorer v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994) (“Advice is not in issue merely ... because the attorney’s advice

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<sup>1</sup> Exhibit A to Dakota’s submission shows that Dakota’s counsel did not engage in a good faith meet-and-confer before bringing yet another discovery matter to the Court. Instead, (1) just before noon on Friday, Oct. 1, he sent an email stating that the email was a “conferral” and that if East River did not, by 5 PM CT the same day, accede to his demand to re-produce Messrs. Boyko and Ryken, he would declare an impasse and take the matter to the Court; (2) East River responded, pointing out that this was not a good faith conferral; (3) Dakota’s counsel responded at 5:21 ET the same day, expressing no interest in having a meet-and-confer, reiterating the proposed “conferral” that East River re-produce the witnesses for cross-examination, and stating he was willing to consider a proposal from East River, with no indication that an impasse would be declared if East River did not respond by a certain date/time; (4) at 4:32 ET on Monday, Oct. 4 (not even a full business day later), Dakota declared an impasse.

might affect the client's state of mind in a relevant manner.").

And East River has never relied on advice of counsel to Messrs. Ryken or Boyko in support of its claim or defense. In fact, East River objected to producing a Rule 30(b)(6) witness as to interpretation of contract issues, as that is a matter for the Court. (Exs. A & B, responses 1, 5, 6, 9, 10, 17.) And Judge Piersol has indicated that board members' interpretations of the contracts are not relevant. (Ex. C, Hr'g Tr. at 13–14.) The three other instances cited by Dakota involved mere objections to the extent the question potentially invaded privilege. Contrary to Dakota's assertion, *there was no instruction not to answer*:

- As to Mr. Boyko's notes, East River's counsel (who could not see the document) objected "to the extent" any of the notes reflected attorney communications. This was explained on the record. (Ex. D, Boyko at 46:20–22, 49:12–50:25.)
- As to Mr. Ryken, Dakota's counsel specifically stated that he was not asking what came out of the board's executive session. (Ex. E, Ryken at 108:18–109:13.)
- Finally, Dakota's counsel asked Mr. Boyko about the basis for his interpretation of a document, he truthfully stated it was based on the advice of his counsel, and Dakota's counsel moved on. (Ex. D, Boyko at 214:21–215:9.)

Thus, Dakota has no basis for seeking a "re-do" as to these areas of inquiry.

#### **B. Dakota's Examination into Matters Outside the Scope of Phase One.**

Dakota's counsel made repeated efforts to go beyond Judge Piersol's explicit limitations on Phase One discovery. East River's counsel objected but gave leeway, allowing Mr. Boyko to answer numerous questions. (Ex. D, Boyko at 52:1–61:1, 111:18–112:22.) Counsel instructed the witness not to answer only a few times, after it became obvious that Dakota's counsel was making no effort to stay within the Court-imposed limits. The first two instructions not to answer were limited to questions about a post-complaint member petition. (*Id.* at 61:21–63:5, 112:25–113:22.) And the third was about potential terms of withdrawal *if* Dakota has the right to do so, which is clearly beyond Phase One. (*Id.* at 119:5–120:11.) East River's counsel repeatedly

offered to “discuss the matter offline” (*i.e.*, off the record),<sup>2</sup> but Mr. Herzog refused. (*Id.* at 55:11–19, 62:1–63:4.) None of these areas of inquiry are anywhere close to being within the six limited topics ordered for Phase One. (Doc. 57 at 2–3.) Because counsel “may instruct a deponent not to answer ... when necessary to ... enforce a limitation ordered by the court,” Fed. R. Civ. P. 30(c)(2), East River’s objections and instructions were proper.

Dakota seeks to muddy the waters with unfounded assertions having no bearing on the limited scope of Phase One—Dakota’s contractual termination right or right to withdraw.<sup>3</sup> Dakota has never gone back to the Court to seek an expansion of Phase One. And contrary to Dakota’s position, Phase One does not include any and all matters contained in documents produced by other parties, which could expand discovery exponentially.

### **C. Dakota’s Baseless Assertions of Improper Coaching.**

Counsel and a witness have the right to confer while a question is pending if there is a concern that, in answering the question, the witness might reveal an attorney-client communication. *See, e.g., Hall v. Clifton Precision*, 150 F.R.D. 525, 529 (E.D. Pa. 1993) (“[T]he majority of federal courts which have issued deposition guidelines have held that a private conference between witness and attorney is permissible if the purpose of the conference is to decide whether to assert a privilege.”).<sup>4</sup> Counsel have an obligation to vigilantly protect the

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<sup>2</sup> In footnote 1 of its position statement, Dakota dismisses Mr. Orr’s offer to talk offline with a flippant, “whatever that means,” even though Dakota’s counsel had used this exact phrase earlier, telling East River’s counsel, “Yeah. Mike, we can talk about this offline.” (Ex. B., Boyko at 49:19–20.)

<sup>3</sup> For example, Dakota accuses East River of colluding with Dakota members (Pos. Stmt. at 2), but fails to inform the Court that East River is itself a member of Dakota and that the petition was drafted by the members’ counsel, not by East River or its attorneys. (Ex. D, Boyko at 139:22–140:22.) Nor were documents “withheld by East River” as Dakota claims. (Pos. Stmt. at 2.) Under the agreed protocol, parties are not required to produce ESI generated after the complaint was filed, November 6, 2020. (Doc. 56 at 4.) The emails in Dakota’s Exhibit D start November 23.

<sup>4</sup> Contrary to Dakota’s assertion, a communication between East River and RUS could (among other things) fall within the common-interest privilege, as RUS was East River’s lender and required the wholesale power contracts as security. (Doc. 71-1 at 4 (“Indeed, one of the WPC’s express purposes is to ensure the repayment of loans East River has with the Rural Utilities Service.”).) *See In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997).

attorney-client privilege, particularly where, as here, opposing counsel repeatedly argue waiver.

That is what happened here. In response to questions, Mr. Boyko began describing a phone call with RUS and was asked about the subject of that conversation. East River's counsel stated on the record the need to confer with the witness and/or inside counsel to make sure that Mr. Boyko would not inadvertently disclose an attorney-client communication. (Ex. D., Boyko at 154:1–155:3.) After a brief pause in the deposition, counsel for East River returned to the deposition and stated, "I apologize for the interruption. Please proceed." (*Id.* at 155:12–13.) The deposition then resumed, and Mr. Boyko testified at length about the subject of the conversation, although he was uncertain about specifics. After numerous questions, and after being asked three times about the name of the RUS representative who was on the call, Mr. Boyko stated that he could not remember the person's name and could not even recall if he was actually on the call or just heard about it afterwards. (*Id.* at 159:10–24.) That was the only change in his testimony.<sup>5</sup>

Dakota's accusation that Mr. Luce coached Mr. Boyko into changing his testimony is groundless. When asked about any conversations with counsel on the break, Mr. Boyko stated that he "saw them in the hallway ... but they did not direct me to do anything, no." (*Id.* at 160:5–7.) East River's counsel tried to explain the basis for taking the break, but Mr. Herzog cut him off, saying, "No, no, no. You can tell it to the Magistrate ...." (*Id.* at 163:22–164:7.) Mr. Herzog then moved on to another topic, so there would be no reason to recall the witness in any event.

For all these reasons, Dakota's request to reconvene these depositions should be denied.

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<sup>5</sup> Dakota's assertion that there was reason to believe the witness was previously coached is baseless. The witness had testified that he had not spoken with a certain individual, and then, hours of examination later, recalled that he had spoken with that person as to one topic. There was absolutely no indication of coaching. (Ex. D, Boyko at 90:15–91:17.)

# EXHIBIT A

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION

<p>DAKOTA ENERGY COOPERATIVE, INC.,</p> <p><i>Plaintiff/ Counter-Claim Defendant,</i></p> <p>v.</p> <p>EAST RIVER ELECTRIC POWER COOPERATIVE, INC.,</p> <p><i>Defendant/ Counter-Claim Plaintiff/ Cross-Claim Defendant,</i></p> <p>and</p> <p>BASIN ELECTRIC POWER COOPERATIVE,</p> <p><i>Intervenor-Defendant/ Counter-Claim Plaintiff/ Cross-Claim Plaintiff.</i></p>	<p>4:20-cv-04192-LLP</p> <p><b>EAST RIVER ELECTRIC POWER COOPERATIVE, INC.’S OBJECTIONS AND RESPONSES TO PLAINTIFF’S NOTICE OF VIDEOTAPED RULE 30(B)(6) DEPOSITION OF EAST RIVER ELECTRIC POWER COOPERATIVE, INC. AND 30(B)(1) DEPOSITON OF TOM BOYKO</b></p> <p><b>[DISCOVERY PHASE ONE]</b></p>
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Defendant / Counter-Claim Plaintiff / Cross-Claim Defendant East River Electric Power Cooperative, Inc. (“East River”), pursuant to Fed. R. Civ. P. 26, objects and responds to Dakota Energy Cooperative, Inc.’s (“Dakota” or “Dakota Energy”) Notice of Videotaped Rule 30(b)(6) Deposition of East River and 30(b)(1) Deposition of Tom Boyko (the “Notice”) and to the topics set forth in Exhibit A to the Notice as follows:

### **GENERAL OBJECTIONS TO THE NOTICE**

1. East River objects to the location of the deposition set forth in the Notice. East River also objects to the date and time of the deposition set forth in the Notice, as it conflicts with the date and time set forth in Dakota's deposition notice to James Ryken. East River will meet and confer with Dakota to discuss the location, date/time, and format (*i.e.*, virtual or in person) of the deposition.

2. East River objects to the Notice to the extent Dakota seeks information or seeks to impose requirements beyond the scope of Phase One discovery ordered in this action. (*See* Dkt. No. 57.)

3. East River objects to the Notice to the extent Dakota seeks information that is not known or reasonably available to East River or seeks to impose a requirement upon East River to search for information beyond that which is required by the Federal Rules of Civil Procedure.

4. East River objects to the Notice to the extent Dakota seeks information already in Dakota's possession, custody, or control, or information available to Dakota from a public, third party, or other source that Dakota could obtain as easily as East River.

5. East River's discovery, review, and investigation of the claims made in this litigation is ongoing. East River reserves the right to supplement, revise, amend, and/or correct its objections and responses to the Notice and to the specific topics if and when additional, different, or more accurate information becomes available.

6. East River will respond to the specific topics as it interprets and



understands them. East River reserves the right to supplement its objections and responses if Dakota subsequently asserts an interpretation of any topic that differs from East River's understanding.

### **RESPONSES AND OBJECTIONS TO 30(b)(6) TOPICS**

1. East River's knowledge, understanding, or interpretation of the documents that East River contends governs the relationship between Dakota Energy and East River, including the reasons or bases for East River's position or contention.

**Response:** East River objects to this Topic on the grounds that contract interpretation is a question of law and solely within the province of the Court. (*See, e.g.*, Transcript of May 21, 2021 Hearing at 13:8-9, 14:7-10 (Judge Piersol's comments).) East River further objects to this Topic to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege.

Subject to and without waiving the foregoing objections, East River states that it will produce Tom Boyko to testify as to East River's knowledge or understanding of the documents that East River contends governs the relationship between Dakota Energy and East River, including the reasons or bases for East River's position or contention.

2. Any discussion, whether oral or in writing, involving East River and any lender regarding any actual, potential, or proposed withdrawal or the terms of any actual, potential, or proposed withdrawal of any member from East River or Basin Electric.

**Response:** East River objects to this Topic to the extent it seeks information that was expressly found by both Judge Piersol (Dkt. No. 57 § 5) and Magistrate Judge Duffy (Dkt. Nos. 70 § A, 72 § A) to be outside the scope of Phase One discovery. East River further objects to this Topic on the grounds that East River's communications with lenders are not relevant to the claims and defenses asserted in this case.

Subject to and without waiving the foregoing objections, East River states that it will produce Tom Boyko to testify as to Topic No. 2 to the extent such communications “are relevant and . . . are related to withdrawal or termination of a member,” consistent with Magistrate Judge Duffy’s August 27, 2021 Order (the “August 27 Order”).

3. East River’s loan agreements or covenants between East River and any lender, including but not limited to the Notes, as defined in the Wholesale Power Contract (“WPC”) between East River and Dakota Energy.

**Response:** East River objects to this Topic to the extent it seeks information that was expressly found by both Judge Piersol (Dkt. No. 57 § 5) and Magistrate Judge Duffy (Dkt. Nos. 70 § A, 72 § A) to be outside the scope of Phase One discovery. East River further objects to this Topic on the grounds that East River’s agreements with third parties are not relevant to the claims and defenses asserted in this case.

Subject to and without waiving the foregoing objections, East River states that it will produce Tom Boyko to testify as to Topic No. 3 to the extent such loan documents “are relevant and . . . are related to withdrawal or termination of a member,” consistent with the August 27 Order.

4. East River’s position or contention regarding whether East River’s members are permitted to withdraw from membership in East River or Basin Electric and on what terms, including the reasons or bases for East River’s position or contention.

**Response:** East River objects to this Topic to the extent it seeks information regarding “on what terms” an East River member might be permitted to withdraw from membership on the grounds that (1) it is beyond the scope of Phase One discovery and not relevant to the claims and defenses asserted in this case; (2) it seeks information regarding hypothetical terms that might in the future be prescribed by an East River

Board of Directors should a member meet all its contractual obligations to East River and seek to withdraw; and (3) such hypothetical terms are not known or reasonably available within East River. As to a potential withdrawal of a member from Basin Electric Power Cooperative (“Basin”), East River objects that this Topic seeks information that is not known or reasonably available within East River. East River further objects to this Topic to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege.

Subject to and without waiving the foregoing objections, East River states that it will produce Tom Boyko to testify as to East River’s position or contention regarding whether East River’s members are permitted to withdraw from membership in East River, including the reasons or bases for East River’s position or contention.

5. East River’s knowledge, understanding, or interpretation of Section 14 of the Wholesale Power Contract (“WPC”) between East River and Dakota Energy.

**Response:** East River objects to this Topic on the grounds that contract interpretation is a question of law and solely within the province of the Court. East River further objects to this Topic on the grounds that Section 14 of the WPC is not relevant to the claims and defenses asserted in this case. East River also objects to this Topic to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege.

Subject to and without waiving the foregoing objections, East River states that it will produce Tom Boyko to testify as to East River’s knowledge or understanding of Section 14 of the WPC between East River and Dakota.

6. East River’s knowledge, understanding, or interpretation of its Bylaws pertaining to member withdrawal, including but not limited to Article I, Section 5(a) which states that a “member may withdraw from membership upon compliance with such equitable terms and conditions as the Board of Directors may prescribe, provided, however, that no member shall be permitted to withdraw until it has met all contractual obligations to the Cooperative.”

**Response:** East River objects to this Topic on the grounds that contract interpretation is a question of law and solely within the province of the Court. East River further objects to this Topic to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege.

Subject to and without waiving the foregoing objections, East River states that it will produce Tom Boyko to testify as to East River’s knowledge or understanding of its Bylaws pertaining to member withdrawal, including but not limited to Article I, Section 5(a), which states that a “member may withdraw from membership upon compliance with such equitable terms and conditions as the Board of Directors may prescribe, provided, however, that no member shall be permitted to withdraw until it has met all contractual obligations to the Cooperative.”

7. East River’s position or contention regarding the specific equitable terms and conditions, if any, that East River can or may prescribe in connection with Dakota Energy’s actual or potential withdrawal from East River.

**Response:** East River objects to this Topic on the grounds that it is beyond the scope of Phase One discovery and not relevant to the claims or defenses asserted in this case. East River further objects to this Topic on the grounds that it concerns hypothetical terms that might in the future be prescribed by an East River Board of Directors should Dakota meet all its contractual obligations to East River and seek to withdraw, and such

hypothetical terms are not currently known or reasonably available within East River. East River also objects to this Topic to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege.

Based on the foregoing objections, East River states that it will not produce a witness to testify as to Topic No. 7.

8. East River's knowledge, understanding, or interpretation of the seven cooperative principles and how these principles apply to any actual, potential, or proposed request from an East River member to withdraw from membership in East River or Basin Electric.

**Response:** East River objects to this Topic to the extent it seeks information that was expressly found by both Judge Piersol (Dkt. No. 57 § 5) and Magistrate Judge Duffy (Dkt. Nos. 70 § B, 72 § B) to be outside the scope of Phase One discovery. East River further objects that the seven cooperative principles are not relevant to the claims and defenses asserted in this case. East River further objects that this Topic is vague, uncertain, ambiguous, speculative, and fails to state with reasonable particularity the matters for examination, thereby preventing East River from being able to adequately prepare a witness to respond to the Topic. East River also objects to this Topic to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege.

Based on the foregoing objections, East River states that it will not produce a witness to testify as to Topic No. 8.

9. East River's knowledge, understanding, or interpretation of any early termination rights or options under Dakota Energy's WPC with East River or any similar agreement East River has with any other East River member. This includes, but is not limited to, the statement in the Supplemental Report of the Parties' Planning Meeting that

“East River’s position is that the Wholesale Power Contract does not provide for early termination ...”

**Response:** East River objects to this Topic on the grounds that contract interpretation is a question of law and solely within the province of the Court. East River further objects that the phrase “or any similar agreement” is vague, uncertain, ambiguous, and fails to state with reasonable particularity the matters for examination. East River interprets this phrase to mean a WPC between East River and an East River member that is substantially similar to the East River-Dakota WPC. East River also objects to this Topic to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege.

Subject to and without waiving the foregoing objections, East River states that it will produce Tom Boyko to testify as to East River’s knowledge or understanding of any early termination rights or options under Dakota’s WPC with East River, including but not limited to, the statement in the Supplemental Report of the Parties’ Planning Meeting that “East River’s position is that the Wholesale Power Contract does not provide for early termination and Dakota Energy is not permitted to withdraw from East River prior to fulfilling its obligations under the Wholesale Power Contract.”

10. East River’s understanding or interpretation of any early termination rights or options under the WPC (or similar contract for the sale and purchase of electricity) between East River and Basin Electric.

**Response:** East River objects to this Topic on the grounds that contract interpretation is a question of law and solely within the province of the Court. East River further objects to this Topic on the grounds that the WPC between East River and Basin

is not relevant to the claims and defenses asserted in this case. East River also objects to the Topic as the phrase “or similar contract for the sale and purchase of electricity” is vague, uncertain, ambiguous, and fails to state with reasonable particularity the matters for examination, thereby preventing East River from being able to adequately prepare a witness to respond to the Topic. East River interprets this to mean the WPC between East River and Basin. East River further objects to this Topic to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege.

Subject to and without waiving the foregoing objections, East River states it will produce Tom Boyko to testify as to East River’s understanding of any early termination rights or options under the WPC between East River and Basin.

11. East River’s knowledge of Basin Electric’s Board Policy No. 15, including but not limited to, the reasoning for distinguishing between Basin Electric Class C members purchasing power from Basin Electric Class A members that have a Contract Rate of Delivery with Basin and Basin Electric Class C members purchasing power from Basin Electric Class A members that have an all-requirements contract with Basin.

**Response:** East River objects to this Topic on the grounds that Basin’s Board Policy No. 15 is not relevant to the claims and defenses asserted in this case, as that is a board policy of a separate entity, not of East River. East River further objects that it cannot and will not testify as to the “reasoning” behind Basin’s decision to distinguish between its Class A and Class C members with respect to Basin’s Board Policy No. 15.

Subject to and without waiving the foregoing objections, East River states that it will produce Tom Boyko to testify as to East River’s knowledge of Board Policy No. 15.

12. Whether any member of East River has requested to withdraw from membership in East River and/or obtain equitable terms and conditions (including especially any buyout number) for exit, and if so, whether and how equitable terms and conditions (including especially any buyout number) for exit were determined for that member.

**Response:** East River objects to this Topic to the extent it exceeds the scope of Phase One discovery and is not relevant to the claims and defenses asserted in this case. East River also objects to this Topic to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege.

Subject to and without waiving the foregoing objections, East River states that it will produce Tom Boyko to testify as to Topic No. 12.

13. East River's response to Dakota Energy's Board Resolution No. 2018-02. This topic includes, but is not limited to, the reasoning underlying Jim Ryken's letter dated March 7, 2019, on behalf of East River, responding to Dakota Energy's Board Resolution No. 2018-02, and stating that the Wholesale Power Contract "between our two cooperatives does not provide for a buy-out. As a result, we must decline your request."

**Response:** East River objects to this Topic to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege.

Subject to and without waiving the foregoing objections, East River states that it will produce James Ryken to testify as to Topic No. 13.

14. East River's understanding of the Board Resolution adopted by Basin at a meeting on February 13, 2019 that was circulated to all Basin Class A members under cover letter signed by Paul Sukut on February 15, 2019.

**Response:** East River objects to this Topic to the extent it exceeds the scope of Phase One discovery and is not relevant to the claims and defenses asserted in this case.



East River further objects to this Topic to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege.

Subject to and without waiving the foregoing objections, East River states that it will produce Tom Boyko to testify as to Topic No. 14.

15. East River's knowledge of, response to, or understanding of the withdrawal or requested withdrawal of any member of Tri-State Generation & Transmission Association, Inc., including Kit Carson Electric Cooperative, Delta-Montrose Electric Association, United Power, Inc., and La Plata Electric Association, Inc.

**Response:** East River objects to this Topic to the extent it exceeds the scope of Phase One discovery and is not relevant to the claims and defenses asserted in this case. East River further objects to this Topic to the extent it seeks information that is not known or reasonably available within East River. East River also objects to this Topic to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege.

Subject to and without waiving the foregoing objections, East River states that it will produce Tom Boyko to testify as to Topic No. 15.

16. East River's communications with any third parties regarding Dakota Energy's actual or potential withdrawal from East River.

**Response:** East River objects to this Topic to the extent it exceeds the scope of Phase One discovery and is not relevant to the claims and defenses asserted in this case. East River further objects to this Topic to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, the joint defense or common interest privilege, or any other applicable privilege.

Subject to and without waiving the foregoing objections, East River states that it will produce Tom Boyko to testify as to Topic No. 16.

17. East River's understanding of any duties (express or implied) that it owes to Dakota Energy under the terms of the WPC, as well as the bases for that understanding.

**Response:** East River objects to this Topic on the grounds that contract interpretation is a question of law and solely within the province of the Court. East River further objects to this Topic to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege.

Subject to and without waiving the foregoing objections, East River states that it will produce Tom Boyko to testify as to Topic No. 17.

18. The factual support or bases for East River's Affirmative Defenses to the Complaint.

**Response:** East River states that it will produce Tom Boyko to testify as to Topic No. 18.

19. Actions, if any, by the East River Board of Directors to evaluate its rights and obligations under East River's WPC with Basin, including opportunities for pursuing power supply options that would reduce or stabilize the cost of purchasing power supplied to the members of East River.

**Response:** East River objects to this Topic on the grounds that it seeks information that is beyond the scope of Phase One discovery and is not relevant to the claims or defenses asserted in this case. East River further objects that this Topic is overly broad and not limited in time or scope, and not proportional to the needs of the action as required by Rule 26. East River also objects to this Topic to the extent it seeks

information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege.

Based on the foregoing objections, East River states that it will not produce a witness to testify as to Topic No. 19.

20. The systems, databases, data repositories, processes, and methods that have been or are being used by East River to record, store, analyze, retrieve, retain or keep track of information relating to Dakota's Discovery Requests or any of Your discovery obligations in this matter.

**Response:** East River objects to this Topic on the grounds that it seeks information that is beyond the scope of Phase One discovery and is not relevant to the claims or defenses asserted in this case. East River further objects to this Topic to the extent it seeks information protected by the work product doctrine or any other applicable privilege.

Based on the foregoing objections, East River states that it will not produce a witness to testify as to Topic No. 20.

21. The location of all data repositories containing information relating to Dakota's Discovery Requests or any of Your discovery obligations in this matter.

**Response:** East River objects to this Topic on the grounds that it seeks information that is beyond the scope of Phase One discovery and is not relevant to the claims or defenses asserted in this case.

Based on the foregoing objections, East River states that it will not produce a witness to testify as to Topic No. 21.

22. East River's email management system, including but not limited to its policies and procedures regarding the preservation, monitoring, and privacy protections

for any email communications stored on its system or that are stored by third parties on its behalf.

**Response:** East River objects to this Topic on the grounds that it seeks information that is beyond the scope of Phase One discovery and is not relevant to the claims or defenses asserted in this case.

Based on the foregoing objections, East River states that it will not produce a witness to testify as to Topic No. 22.

Dated September 8, 2021.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

/s/ Michael L. Luce

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*Attorneys for Defendant East River Electric  
Power Cooperative, Inc.*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on September 8, 2021, a true and correct copy of the foregoing document:

- **EAST RIVER ELECTRIC POWER COOPERATIVE, INC.'S OBJECTIONS AND RESPONSES TO PLAINTIFF'S NOTICE OF VIDEOTAPED RULE 30(B)(6) DEPOSITION OF EAST RIVER ELECTRIC POWER COOPERATIVE, INC. AND 30(B)(1) DEPOSITION OF TOM BOYKO – [DISCOVERY PHASE ONE]**

has been served electronically via e-mail upon the following:

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/s/ Michael L. Luce

Michael L. Luce

# EXHIBIT B

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION

<p>DAKOTA ENERGY COOPERATIVE, INC.,</p> <p><i>Plaintiff/ Counter-Claim Defendant,</i></p> <p>v.</p> <p>EAST RIVER ELECTRIC POWER COOPERATIVE, INC.,</p> <p><i>Defendant/ Counter-Claim Plaintiff/ Cross-Claim Defendant,</i></p> <p>and</p> <p>BASIN ELECTRIC POWER COOPERATIVE,</p> <p><i>Intervenor-Defendant/ Counter-Claim Plaintiff/ Cross-Claim Plaintiff.</i></p>	<p>4:20-cv-04192-LLP</p> <p><b>EAST RIVER ELECTRIC POWER COOPERATIVE, INC.’S OBJECTIONS AND RESPONSES TO PLAINTIFF’S NOTICE OF VIDEOTAPED RULE 30(B)(6) DEPOSITION OF EAST RIVER ELECTRIC POWER COOPERATIVE, INC. AND 30(B)(1) DEPOSITON OF JAMES RYKEN</b></p> <p><b>[DISCOVERY PHASE ONE]</b></p>
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Defendant / Counter-Claim Plaintiff / Cross-Claim Defendant East River Electric Power Cooperative, Inc. (“East River”), pursuant to Fed. R. Civ. P. 26, objects and responds to Dakota Energy Cooperative, Inc.’s (“Dakota” or “Dakota Energy”) Notice of Videotaped Rule 30(b)(6) Deposition of East River and 30(b)(1) Deposition of James Ryken (the “Notice”) and to the topics set forth in Exhibit A to the Notice as follows:



### **GENERAL OBJECTIONS TO THE NOTICE**

1. East River objects to the location of the deposition set forth in the Notice. East River also objects to the date and time of the deposition set forth in the Notice, as it conflicts with the date and time set forth in Dakota's deposition notice to Tom Boyko. East River will meet and confer with Dakota to discuss the location, date/time, and format (*i.e.*, virtual or in person) of the deposition.
2. East River objects to the Notice to the extent Dakota seeks information or seeks to impose requirements beyond the scope of Phase One discovery ordered in this action. (*See* Dkt. No. 57.)
3. East River objects to the Notice to the extent Dakota seeks information that is not known or reasonably available to East River or seeks to impose a requirement upon East River to search for information beyond that which is required by the Federal Rules of Civil Procedure.
4. East River objects to the Notice to the extent Dakota seeks information already in Dakota's possession, custody, or control, or information available to Dakota from a public, third party, or other source that Dakota could obtain as easily as East River.
5. East River's discovery, review, and investigation of the claims made in this litigation is ongoing. East River reserves the right to supplement, revise, amend, and/or correct its objections and responses to the Notice and to the specific topics if and when additional, different, or more accurate information becomes available.
6. East River will respond to the specific topics as it interprets and

understands them. East River reserves the right to supplement its objections and responses if Dakota subsequently asserts an interpretation of any topic that differs from East River's understanding.

### **RESPONSES AND OBJECTIONS TO 30(b)(6) TOPICS**

1. East River's knowledge, understanding, or interpretation of the documents that East River contends governs the relationship between Dakota Energy and East River, including the reasons or bases for East River's position or contention.

**Response:** East River objects to this Topic on the grounds that contract interpretation is a question of law and solely within the province of the Court. (*See, e.g.*, Transcript of May 21, 2021 Hearing at 13:8-9, 14:7-10 (Judge Piersol's comments).) East River further objects to this Topic to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege.

Subject to and without waiving the foregoing objections, East River states that it will produce Tom Boyko to testify as to East River's knowledge or understanding of the documents that East River contends governs the relationship between Dakota Energy and East River, including the reasons or bases for East River's position or contention.

2. Any discussion, whether oral or in writing, involving East River and any lender regarding any actual, potential, or proposed withdrawal or the terms of any actual, potential, or proposed withdrawal of any member from East River or Basin Electric.

**Response:** East River objects to this Topic to the extent it seeks information that was expressly found by both Judge Piersol (Dkt. No. 57 § 5) and Magistrate Judge Duffy (Dkt. Nos. 70 § A, 72 § A) to be outside the scope of Phase One discovery. East River further objects to this Topic on the grounds that East River's communications with lenders are not relevant to the claims and defenses asserted in this case.

Subject to and without waiving the foregoing objections, East River states that it will produce Tom Boyko to testify as to Topic No. 2 to the extent such communications “are relevant and . . . are related to withdrawal or termination of a member,” consistent with Magistrate Judge Duffy’s August 27, 2021 Order (the “August 27 Order”).

3. East River’s loan agreements or covenants between East River and any lender, including but not limited to the Notes, as defined in the Wholesale Power Contract (“WPC”) between East River and Dakota Energy.

**Response:** East River objects to this Topic to the extent it seeks information that was expressly found by both Judge Piersol (Dkt. No. 57 § 5) and Magistrate Judge Duffy (Dkt. Nos. 70 § A, 72 § A) to be outside the scope of Phase One discovery. East River further objects to this Topic on the grounds that East River’s agreements with third parties are not relevant to the claims and defenses asserted in this case.

Subject to and without waiving the foregoing objections, East River states that it will produce Tom Boyko to testify as to Topic No. 3 to the extent such loan documents “are relevant and . . . are related to withdrawal or termination of a member,” consistent with the August 27 Order.

4. East River’s position or contention regarding whether East River’s members are permitted to withdraw from membership in East River or Basin Electric and on what terms, including the reasons or bases for East River’s position or contention.

**Response:** East River objects to this Topic to the extent it seeks information regarding “on what terms” an East River member might be permitted to withdraw from membership on the grounds that (1) it is beyond the scope of Phase One discovery and not relevant to the claims and defenses asserted in this case; (2) it seeks information regarding hypothetical terms that might in the future be prescribed by an East River

Board of Directors should a member meet all its contractual obligations to East River and seek to withdraw; and (3) such hypothetical terms are not known or reasonably available within East River. As to a potential withdrawal of a member from Basin Electric Power Cooperative (“Basin”), East River objects that this Topic seeks information that is not known or reasonably available within East River. East River further objects to this Topic to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege.

Subject to and without waiving the foregoing objections, East River states that it will produce Tom Boyko to testify as to East River’s position or contention regarding whether East River’s members are permitted to withdraw from membership in East River, including the reasons or bases for East River’s position or contention.

5. East River’s knowledge, understanding, or interpretation of Section 14 of the Wholesale Power Contract (“WPC”) between East River and Dakota Energy.

**Response:** East River objects to this Topic on the grounds that contract interpretation is a question of law and solely within the province of the Court. East River further objects to this Topic on the grounds that Section 14 of the WPC is not relevant to the claims and defenses asserted in this case. East River also objects to this Topic to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege.

Subject to and without waiving the foregoing objections, East River states that it will produce Tom Boyko to testify as to East River’s knowledge or understanding of Section 14 of the WPC between East River and Dakota.

6. East River’s knowledge, understanding, or interpretation of its Bylaws pertaining to member withdrawal, including but not limited to Article I, Section 5(a) which states that a “member may withdraw from membership upon compliance with such equitable terms and conditions as the Board of Directors may prescribe, provided, however, that no member shall be permitted to withdraw until it has met all contractual obligations to the Cooperative.”

**Response:** East River objects to this Topic on the grounds that contract interpretation is a question of law and solely within the province of the Court. East River further objects to this Topic to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege.

Subject to and without waiving the foregoing objections, East River states that it will produce Tom Boyko to testify as to East River’s knowledge or understanding of its Bylaws pertaining to member withdrawal, including but not limited to Article I, Section 5(a), which states that a “member may withdraw from membership upon compliance with such equitable terms and conditions as the Board of Directors may prescribe, provided, however, that no member shall be permitted to withdraw until it has met all contractual obligations to the Cooperative.”

7. East River’s position or contention regarding the specific equitable terms and conditions, if any, that East River can or may prescribe in connection with Dakota Energy’s actual or potential withdrawal from East River.

**Response:** East River objects to this Topic on the grounds that it is beyond the scope of Phase One discovery and not relevant to the claims or defenses asserted in this case. East River further objects to this Topic on the grounds that it concerns hypothetical terms that might in the future be prescribed by an East River Board of Directors should Dakota meet all its contractual obligations to East River and seek to withdraw, and such

hypothetical terms are not currently known or reasonably available within East River. East River also objects to this Topic to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege.

Based on the foregoing objections, East River states that it will not produce a witness to testify as to Topic No. 7.

8. East River's knowledge, understanding, or interpretation of the seven cooperative principles and how these principles apply to any actual, potential, or proposed request from an East River member to withdraw from membership in East River or Basin Electric.

**Response:** East River objects to this Topic to the extent it seeks information that was expressly found by both Judge Piersol (Dkt. No. 57 § 5) and Magistrate Judge Duffy (Dkt. Nos. 70 § B, 72 § B) to be outside the scope of Phase One discovery. East River further objects that the seven cooperative principles are not relevant to the claims and defenses asserted in this case. East River further objects that this Topic is vague, uncertain, ambiguous, speculative, and fails to state with reasonable particularity the matters for examination, thereby preventing East River from being able to adequately prepare a witness to respond to the Topic. East River also objects to this Topic to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege.

Based on the foregoing objections, East River states that it will not produce a witness to testify as to Topic No. 8.

9. East River's knowledge, understanding, or interpretation of any early termination rights or options under Dakota Energy's WPC with East River or any similar agreement East River has with any other East River member. This includes, but is not limited to, the statement in the Supplemental Report of the Parties' Planning Meeting that

“East River’s position is that the Wholesale Power Contract does not provide for early termination ...”

**Response:** East River objects to this Topic on the grounds that contract interpretation is a question of law and solely within the province of the Court. East River further objects that the phrase “or any similar agreement” is vague, uncertain, ambiguous, and fails to state with reasonable particularity the matters for examination. East River interprets this phrase to mean a WPC between East River and an East River member that is substantially similar to the East River-Dakota WPC. East River also objects to this Topic to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege.

Subject to and without waiving the foregoing objections, East River states that it will produce Tom Boyko to testify as to East River’s knowledge or understanding of any early termination rights or options under Dakota’s WPC with East River, including but not limited to, the statement in the Supplemental Report of the Parties’ Planning Meeting that “East River’s position is that the Wholesale Power Contract does not provide for early termination and Dakota Energy is not permitted to withdraw from East River prior to fulfilling its obligations under the Wholesale Power Contract.”

10. East River’s understanding or interpretation of any early termination rights or options under the WPC (or similar contract for the sale and purchase of electricity) between East River and Basin Electric.

**Response:** East River objects to this Topic on the grounds that contract interpretation is a question of law and solely within the province of the Court. East River further objects to this Topic on the grounds that the WPC between East River and Basin

is not relevant to the claims and defenses asserted in this case. East River also objects to the Topic as the phrase “or similar contract for the sale and purchase of electricity” is vague, uncertain, ambiguous, and fails to state with reasonable particularity the matters for examination, thereby preventing East River from being able to adequately prepare a witness to respond to the Topic. East River interprets this to mean the WPC between East River and Basin. East River further objects to this Topic to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege.

Subject to and without waiving the foregoing objections, East River states it will produce Tom Boyko to testify as to East River’s understanding of any early termination rights or options under the WPC between East River and Basin.

11. East River’s knowledge of Basin Electric’s Board Policy No. 15, including but not limited to, the reasoning for distinguishing between Basin Electric Class C members purchasing power from Basin Electric Class A members that have a Contract Rate of Delivery with Basin and Basin Electric Class C members purchasing power from Basin Electric Class A members that have an all-requirements contract with Basin.

**Response:** East River objects to this Topic on the grounds that Basin’s Board Policy No. 15 is not relevant to the claims and defenses asserted in this case, as that is a board policy of a separate entity, not of East River. East River further objects that it cannot and will not testify as to the “reasoning” behind Basin’s decision to distinguish between its Class A and Class C members with respect to Basin’s Board Policy No. 15.

Subject to and without waiving the foregoing objections, East River states that it will produce Tom Boyko to testify as to East River’s knowledge of Board Policy No. 15.



12. Whether any member of East River has requested to withdraw from membership in East River and/or obtain equitable terms and conditions (including especially any buyout number) for exit, and if so, whether and how equitable terms and conditions (including especially any buyout number) for exit were determined for that member.

**Response:** East River objects to this Topic to the extent it exceeds the scope of Phase One discovery and is not relevant to the claims and defenses asserted in this case. East River also objects to this Topic to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege.

Subject to and without waiving the foregoing objections, East River states that it will produce Tom Boyko to testify as to Topic No. 12.

13. East River's response to Dakota Energy's Board Resolution No. 2018-02. This topic includes, but is not limited to, the reasoning underlying Jim Ryken's letter dated March 7, 2019, on behalf of East River, responding to Dakota Energy's Board Resolution No. 2018-02, and stating that the Wholesale Power Contract "between our two cooperatives does not provide for a buy-out. As a result, we must decline your request."

**Response:** East River objects to this Topic to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege.

Subject to and without waiving the foregoing objections, East River states that it will produce James Ryken to testify as to Topic No. 13.

14. East River's understanding of the Board Resolution adopted by Basin at a meeting on February 13, 2019 that was circulated to all Basin Class A members under cover letter signed by Paul Sukut on February 15, 2019.

**Response:** East River objects to this Topic to the extent it exceeds the scope of Phase One discovery and is not relevant to the claims and defenses asserted in this case.

East River further objects to this Topic to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege.

Subject to and without waiving the foregoing objections, East River states that it will produce Tom Boyko to testify as to Topic No. 14.

15. East River's knowledge of, response to, or understanding of the withdrawal or requested withdrawal of any member of Tri-State Generation & Transmission Association, Inc., including Kit Carson Electric Cooperative, Delta-Montrose Electric Association, United Power, Inc., and La Plata Electric Association, Inc.

**Response:** East River objects to this Topic to the extent it exceeds the scope of Phase One discovery and is not relevant to the claims and defenses asserted in this case. East River further objects to this Topic to the extent it seeks information that is not known or reasonably available within East River. East River also objects to this Topic to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege.

Subject to and without waiving the foregoing objections, East River states that it will produce Tom Boyko to testify as to Topic No. 15.

16. East River's communications with any third parties regarding Dakota Energy's actual or potential withdrawal from East River.

**Response:** East River objects to this Topic to the extent it exceeds the scope of Phase One discovery and is not relevant to the claims and defenses asserted in this case. East River further objects to this Topic to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, the joint defense or common interest privilege, or any other applicable privilege.

Subject to and without waiving the foregoing objections, East River states that it will produce Tom Boyko to testify as to Topic No. 16.

17. East River's understanding of any duties (express or implied) that it owes to Dakota Energy under the terms of the WPC, as well as the bases for that understanding.

**Response:** East River objects to this Topic on the grounds that contract interpretation is a question of law and solely within the province of the Court. East River further objects to this Topic to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege.

Subject to and without waiving the foregoing objections, East River states that it will produce Tom Boyko to testify as to Topic No. 17.

18. The factual support or bases for East River's Affirmative Defenses to the Complaint.

**Response:** East River states that it will produce Tom Boyko to testify as to Topic No. 18.

19. Actions, if any, by the East River Board of Directors to evaluate its rights and obligations under East River's WPC with Basin, including opportunities for pursuing power supply options that would reduce or stabilize the cost of purchasing power supplied to the members of East River.

**Response:** East River objects to this Topic on the grounds that it seeks information that is beyond the scope of Phase One discovery and is not relevant to the claims or defenses asserted in this case. East River further objects that this Topic is overly broad and not limited in time or scope, and not proportional to the needs of the action as required by Rule 26. East River also objects to this Topic to the extent it seeks

information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege.

Based on the foregoing objections, East River states that it will not produce a witness to testify as to Topic No. 19.

20. The systems, databases, data repositories, processes, and methods that have been or are being used by East River to record, store, analyze, retrieve, retain or keep track of information relating to Dakota's Discovery Requests or any of Your discovery obligations in this matter.

**Response:** East River objects to this Topic on the grounds that it seeks information that is beyond the scope of Phase One discovery and is not relevant to the claims or defenses asserted in this case. East River further objects to this Topic to the extent it seeks information protected by the work product doctrine or any other applicable privilege.

Based on the foregoing objections, East River states that it will not produce a witness to testify as to Topic No. 20.

21. The location of all data repositories containing information relating to Dakota's Discovery Requests or any of Your discovery obligations in this matter.

**Response:** East River objects to this Topic on the grounds that it seeks information that is beyond the scope of Phase One discovery and is not relevant to the claims or defenses asserted in this case.

Based on the foregoing objections, East River states that it will not produce a witness to testify as to Topic No. 21.

22. East River's email management system, including but not limited to its policies and procedures regarding the preservation, monitoring, and privacy protections

for any email communications stored on its system or that are stored by third parties on its behalf.

**Response:** East River objects to this Topic on the grounds that it seeks information that is beyond the scope of Phase One discovery and is not relevant to the claims or defenses asserted in this case.

Based on the foregoing objections, East River states that it will not produce a witness to testify as to Topic No. 22.

Dated September 8, 2021.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

/s/ Michael L. Luce

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*Attorneys for Defendant East River Electric  
Power Cooperative, Inc.*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on September 8, 2021, a true and correct copy of the foregoing document:

- **EAST RIVER ELECTRIC POWER COOPERATIVE, INC.’S  
OBJECTIONS AND RESPONSES TO PLAINTIFF’S NOTICE OF  
VIDEOTAPED RULE 30(B)(6) DEPOSITION OF EAST RIVER  
ELECTRIC POWER COOPERATIVE, INC. AND 30(B)(1) DEPOSITION  
OF JAMES RYKEN – [DISCOVERY PHASE ONE]**

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/s/ Michael L. Luce

Michael L. Luce

# EXHIBIT C



UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

\* \* \* \* \*

DAKOTA ENERGY COOPERATIVE, INC., 4:20-cv-4192-LLP

Plaintiff, STATUS CONFERENCE

v.

EAST RIVER ELECTRIC POWER  
COOPERATIVE, INC.,

Defendant,

v.

BASIN ELECTRIC POWER  
COOPERATIVE,

Intervenor.

\* \* \* \* \*

TIME AND PLACE: May 24, 2021  
U.S. District Court  
400 S. Phillips  
Sioux Falls, SD 57104

BEFORE: HON. LAWRENCE L. PIERSOL (in person)  
U.S. District Court  
400 S. Phillips Ave., Ste. 202  
Sioux Falls, SD 57104

APPEARANCES: MR. LEE A. Schoenbeck (in person)  
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ATTORNEY FOR PLAINTIFF

1 that are necessary for us to discover, Your Honor. First of  
2 all, the question -- we would seek discovery of East River and  
3 have sought discovery of East River, and we would seek  
4 deposition testimony on how East River and its board has  
5 interpreted the bylaw provision regarding withdraw and how  
6 it's interpreted Section 14 of the whole power contract. We  
7 would --

8 **THE COURT:** What difference does it make to me as to  
9 how they interpret it if I'm going to interpret it?

10 **MR. HERZOG:** Well, you would have to -- you would  
11 have to conclude, Your Honor, that it's not -- that it is --  
12 that parol evidence is not necessary to interpret it and that  
13 it's clear as a matter of law. And, Your Honor, I would submit  
14 to you that, if it were clear as a matter of law, then East  
15 River would have filed a motion to dismiss, but they didn't.  
16 They filed an answer and now are resisting discovery after  
17 having filed an answer and a counterclaim on which we are  
18 seeking discovery. Even their proposal in the Rule 26  
19 conference of counsel report that was provided to you,  
20 Your Honor, envisions a period of time for discovery on the  
21 meaning of the bylaw provision that permits an equitable  
22 withdrawal.

23 If it's a legal question, you don't get discovery on  
24 a legal question. That's a question for the Court to decide  
25 initially. But they have proposed that there be discovery on

1 the question of what the bylaw means, and we believe that that  
2 is appropriate because we believe that we're entitled to  
3 conduct discovery of East River, of its board, and to present  
4 to the Court interpretations of the bylaw that are very  
5 consistent with the allegation with our interpretation as  
6 alleged in our complaint, Your Honor.

7 **THE COURT:** So you're saying is what some board,  
8 compromised of a bunch of laypersons, did would be something  
9 that the Court should consider in determine what the bylaw  
10 says?

11 **MR. HERZOG:** Well, the Court could certainly consider  
12 that testimony in determining whether or not the bylaw is  
13 ambiguous. I believe that the -- that the case law is fairly  
14 settled, that an individual cannot admit a legal interpretation  
15 of the document. But I do believe that the fact that -- that  
16 members of the board of directors, as they may, may interpret  
17 that provision, particularly in the course of dealing, and  
18 whether that course of dealing would, therefore, contribute to  
19 the -- to the evidence on how that bylaw should be construed.

20 I do think in that circumstance, yes, Your Honor,  
21 that would be admissible as a course of dealing. It wouldn't  
22 be admissible as an admission against interest as to the legal  
23 interpretation of a contract. Of course, that would be your  
24 job, Your Honor.

25 **THE COURT:** All right. I'll hear from --

# EXHIBIT D

## In The Matter Of:

*East River Electric Power Cooperative, Inc., et al.*

*Tom Boyko*

*Rough Draft*

*Pat Beck, Court Reporter*

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1 A Yes.  
2 Q All right.  
3 A Correct.  
4 Q Did you make notes on any of the documents?  
5 A I might have. I don't know. I left -- yeah,  
6 maybe. More than likely, I guess.  
7 Q Where would those documents be now, Mr. Boyko?  
8 A At home.  
9 Q Okay. Did you make any notes to help yourself  
10 get ready to prepare today?  
11 MR. ORR: Object to form.  
12 Q (By Mr. Herzog) I mean, other than the ones  
13 that you may have written on the documents, did you,  
14 you know, take the notice of deposition and make  
15 notes? Did you make notes on a separate piece of  
16 paper, anything to help you testify today?  
17 MR. ORR: Object to the form.  
18 A No, other than I got a couple notes here I just  
19 wrote down.  
20 Q (By Mr. Herzog) Okay. When did you write those  
21 down?  
22 A Just sitting here.  
23 Q When?  
24 A While I was sitting here this morning.  
25 Q Before the deposition started?

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1 MR. HERZOG: The witness did.  
2 MR. ORR: No, he didn't. I asserted the  
3 objection.  
4 MR. HERZOG: You assert your objection. That's  
5 just specious.  
6 MR. ORR: No, it's not.  
7 MR. HERZOG: Yes, it is.  
8 Q (By Mr. Herzog) Mr. Boyko --  
9 MR. ORR: No, it's not.  
10 MR. HERZOG: Don't argue with me.  
11 MR. ORR: I'm not. I'm instructing the witness  
12 that if your notes reflect attorney/client  
13 communications you are not to discuss those at  
14 this deposition.  
15 Q (By Mr. Herzog) Did -- you just testified,  
16 Mr. Boyko, that you made those notes during this  
17 deposition, didn't you?  
18 A Well, right at the beginning. I don't know if  
19 we were on video or not.  
20 Q But you made those notes to help you testify at  
21 deposition; right?  
22 A It wasn't to help. It was just -- I was just  
23 sitting here.  
24 Q Well, what were you making them for, Mr. Boyko?  
25 A Sitting here kind of nervous. Okay?

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1 A No.  
2 Q While -- while we were taking the deposition?  
3 A While we were -- yeah, while we were taking the  
4 deposition.  
5 Q Okay. And what are those notes, Mr. Boyko?  
6 MR. ORR: Object to the extent -- Mr. Boyko,  
7 I'm just going to object if any of those notes  
8 concern attorney/client communications, but if not,  
9 you can go ahead and answer.  
10 MR. HERZOG: He's referring to them in the  
11 deposition, Mr. Orr.  
12 Q (By Mr. Herzog) What do the notes say,  
13 Mr. Boyko?  
14 MR. ORR: Same objection.  
15 A Actually, it's scribbled, so two -- well, one  
16 says typo. One says contracts 75. One says no  
17 buy-out, one says fulfill contract.  
18 Q (By Mr. Herzog) Okay. And you made those  
19 during the deposition while you were on camera?  
20 MR. ORR: I'm going to object to the question  
21 to the extent it calls for any disclosure of any  
22 attorney/client communication.  
23 MR. HERZOG: I mean, it's been waived, Mr. Orr.  
24 MR. ORR: No, it hasn't. I didn't waive it. I  
25 didn't waive any objection.

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1 Q Right. And I got no problem with that.  
2 But that -- and, you know, witnesses do that all the  
3 time, Mr. Boyko, and they make notes because they  
4 don't want to forget something and that's perfectly  
5 appropriate. Is that what -- the purpose for which  
6 you were making the notes, making sure you didn't --  
7 you didn't forget anything?  
8 A It wasn't so I wouldn't forget anything. It  
9 was just things that were on my mind.  
10 Q Okay. What was on your mind, sir?  
11 A This deposition.  
12 Q Okay. So were you making the notes to help you  
13 testify in the deposition?  
14 MR. ORR: Object to the form of the question.  
15 Asked and answered.  
16 A No, not specifically. I was sitting here,  
17 nervous, I wrote some things. There was no reason.  
18 Q (By Mr. Herzog) All right. Well, Mr. Boyko, do  
19 you have a cell phone?  
20 A Yes, I do.  
21 Q Could you take a picture of those notes for us,  
22 sir?  
23 MR. ORR: Object to the form of the question.  
24 We can take this up on break. We're not --  
25 MR. HERZOG: No, we're not. No, we're not. I

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1 mean, this is absolutely -- I've never seen anything  
2 like this. This is so obstructionistic, it's hard  
3 to imagine.  
4 Q (By Mr. Herzog) Mr. Boyko, do you have a cell  
5 phone, sir?  
6 A Yes.  
7 Q Would you please take a picture of the notes to  
8 preserve it?  
9 MR. ORR: That's fine.  
10 A (Witness complies with request.)  
11 Q (By Mr. Herzog) All right.  
12 MR. LUCE: Peter, this is Mike Luce. I just  
13 want to make clear I have no idea what these notes  
14 are. I haven't seen them. But we had a meeting  
15 about the executive privilege or attorney/client  
16 privilege. I don't know if any of those notes  
17 relate to that. So before those are transmitted, I  
18 want to make sure on that.  
19 MR. HERZOG: Yeah. Mike, we can talk about  
20 this offline. I've never seen such conduct in my  
21 life where a witness has notes in a deposition that  
22 may have been taken in connection with discussions  
23 with counsel while the witness was on the stand  
24 during a break and now counsel is objecting to the  
25 notes on the basis that they may include

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1 MR. HERZOG: Mr. Orr, just so the record is  
2 clear, he testified on the video, on the record,  
3 that he made the notes during the deposition. And,  
4 you know, now we're -- now we're on to something  
5 where he's making notes about a communication that  
6 may have taken place during the break that he's  
7 referring to as he's testifying. He's already  
8 testified to what's in the notes.  
9 MR. ORR: Okay. Then let's just --  
10 MR. HERZOG: It's just an absolute bizarre  
11 series of events.  
12 Q (By Mr. Herzog) All right. I'm going to share  
13 my screen again with you, sir. And this is number  
14 14. Do you have that in front of you, sir, or do  
15 you want to just --  
16 A I have no idea where it's at.  
17 Q Well, I thought that Mr. Luce was going to  
18 provide you exhibits in printed form. You're  
19 welcome to follow along with me on the screen, if  
20 you'd like, sir. Let me know when you have it in  
21 front of you, please.  
22 MR. LUCE: Tom, I put numbers on the right on  
23 little sticker notes corresponding with that index,  
24 so you should be able to see those.  
25 THE WITNESS: I got it.

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1 attorney/client privileged communications. I've  
2 never seen anything like that.  
3 MR. LUCE: You don't have to editorialize. I  
4 don't know what you've seen and I don't really care.  
5 All I know -- what I care about is we had a private  
6 meeting in the middle of the deposition because --  
7 to address what you were asking about in terms of an  
8 attorney/client privilege. I don't know if he put  
9 something down. I didn't ask him to. I haven't  
10 seen these notes, but I'm certainly as an attorney  
11 not going to permit attorney/client notions, if he  
12 writes down Mike Luce said this, I am not going to  
13 be doing my job if I don't look at them, so you can  
14 editorialize all you want.  
15 MR. HERZOG: You know, Mike, enough. I mean,  
16 it's just mind boggling what you folks are claiming.  
17 MR. ORR: All we're saying is we're going to  
18 review these notes. We had a communication which we  
19 said we were going to do. We took a break in the  
20 deposition. We met with the witness and we  
21 discussed in an attorney/client session, we're just  
22 saying if these notes reflect attorney/client  
23 communications for that meeting, we want to take a  
24 look at those before turning them over. He's  
25 preserved them, so let's move on.

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1 Q (By Mr. Herzog) This is number 14, which, for  
2 the record, in the lower right-hand corner has the  
3 numbers 31DEC Member and 32DEC Member. Do you have  
4 that?  
5 A Yes.  
6 Q Okay. So I'm showing you now on the screen an  
7 e-mail from Mr. Studer dated November 19, 2020, at  
8 6:37. Do you see that? I'm hovering over it with  
9 my cursor.  
10 A No.  
11 Q Do you see on November 19, 2020, at 6:37 p.m.  
12 Chris Studer wrote? Do you see that, about  
13 two-thirds of the way down the page labeled 31DEC  
14 Member?  
15 A I see it here, yes.  
16 Q Okay. And it says, Thank you all so much for  
17 joining the call tonight. Do you see that?  
18 A Yes.  
19 Q Were you involved in that call?  
20 A No.  
21 Q Did Mr. Studer make you aware of that call?  
22 A He told me about it afterwards.  
23 Q Okay. And what did he tell you about it?  
24 A That they had a call, I guess.  
25 Q That who had a call?

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1 A I don't recall. That Chris had a call with  
2 some Dakota members.  
3 Q Which Dakota members?  
4 A I don't recall who he said. I'm sure he  
5 probably said Pat and Jim Probst, but I don't recall  
6 specifically.  
7 Q You understand that you're supposed to be  
8 prepared to testify about this information today?  
9 Do you understand that?  
10 MR. ORR: Object to the form of the question.  
11 A I understand.  
12 Q (By Mr. Herzog) Okay. Do you have any  
13 documents available to you that would allow you to  
14 tell us who was on the call?  
15 A I do not.  
16 Q Okay.  
17 A Not that I'm aware of, I guess.  
18 Q Okay. Did you ask Mr. Studer whether he had  
19 any documents that might allow you to be able to  
20 testify about that call?  
21 A The specific call? No.  
22 Q Okay. Did you authorize this call, sir, by  
23 Mr. Studer?  
24 MR. ORR: Object to the form of the question.  
25 A Specifically, no.

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1 phase one.  
2 Q (By Mr. Herzog) You can answer.  
3 MR. ORR: Can you explain how it's within the  
4 scope of phase one, Counsel?  
5 MR. HERZOG: I don't need to explain how it's  
6 within the scope of phase one. Please answer the  
7 question.  
8 Q (By Mr. Herzog) Was Mr. Studer authorized to  
9 spend East River funds to assist to the group that  
10 he was speaking with?  
11 MR. ORR: Counsel, we can do this offline. I  
12 know you're -- I don't want to make speaking  
13 objections, but there is a limitation on discovery  
14 and it's limited to the phase one issues, so...  
15 Q (By Mr. Herzog) You can answer the question,  
16 sir.  
17 MR. ORR: I'm going to object, Counsel, and I'm  
18 happy to go offline and talk about the phase one  
19 limitation.  
20 MR. HERZOG: Mr. Orr we're not going to go  
21 through this. He can answer the question of whether  
22 he was authorized -- whether East River authorized  
23 expenditures to try to assist this group in  
24 preventing a decision on the question of whether  
25 they have a right to withdraw or not.

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1 Q (By Mr. Herzog) Did the East River board  
2 authorize this call by Mr. Studer?  
3 A Specifically, no.  
4 Q All right. Did you consult with anyone -- did  
5 you, sir, consult with anyone at Basin Electric  
6 about this phone call?  
7 A Not that I recall, no.  
8 Q Do you know whether Mr. Studer consulted with  
9 anyone at Basin Electric about this phone call?  
10 A I have no idea.  
11 Q Do you know whether Mr. Studer had any  
12 communications with anyone at Basin Electric  
13 regarding his communications with Pat Doak and  
14 others?  
15 A I couldn't say. My guess is he did, but I  
16 don't know.  
17 Q Did you ask him in preparation for your  
18 deposition here today, sir?  
19 A No.  
20 Q Okay. Do you know whether Mr. Studer was  
21 authorized to offer financial assistance to the  
22 group that he was speaking -- the group of members  
23 that he was speaking with at Dakota Energy?  
24 MR. DIRENFELD: Object to form.  
25 MR. ORR: Object to form. Exceeds the scope of

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1 MR. ORR: Preventing a decision on whether they  
2 have a right to withdraw. I'm not sure what you're  
3 asking about.  
4 MR. HERZOG: Well, then object to the form,  
5 Mr. Orr.  
6 MR. ORR: I'll object to the form. And I'll --  
7 you know, a little leeway here, but we're not -- we  
8 are going to object to phase -- questions that go  
9 beyond phase one.  
10 MR. HERZOG: Was Mr. -- then object to them and  
11 then we'll move on.  
12 Q (By Mr. Herzog) So was Mr. Studer authorized by  
13 you, Mr. Boyko, to spend East River cooperative  
14 money assisting a group to oppose the efforts by  
15 Dakota Energy to obtain an exit charge to withdraw  
16 from East River?  
17 MR. ORR: Object to the form of the question.  
18 MR. DIRENFELD: Object to form.  
19 Q (By Mr. Herzog) You can answer.  
20 A Not specifically.  
21 Q Did the board authorize Mr. Studer to make East  
22 River expenditures for such a purpose?  
23 MR. ORR: Same objection.  
24 MR. DIRENFELD: Object to form.  
25 MR. ORR: And beyond phase one.



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1 Q (By Mr. Herzog) You may answer, Mr. Boyko?  
2 A Not specifically.  
3 Q Okay. So was Mr. Studer offering to assist  
4 with expenditures on his own? Was that within the  
5 scope of his individual authority at East River?  
6 MR. ORR: Object to the form of the question,  
7 beyond -- and exceeds phase one.  
8 MR. DIRENFELD: Object to form.  
9 A Mr. Studer was acting within the scope of his  
10 job.  
11 Q (By Mr. Herzog) Okay. Did Mr. -- did  
12 Mr. Studer tell you that he was going to spend East  
13 River money to assist the group that was opposing  
14 the efforts of Dakota Energy to obtain an exit  
15 charge number for purposes of determining whether it  
16 wanted to withdraw from East River? Did Mr. Studer  
17 tell you that?  
18 MR. ORR: Object to the form and exceeds phase  
19 one.  
20 MR. DIRENFELD: Object to form. Lacks  
21 foundation.  
22 A What was the question?  
23 Q (By Mr. Herzog) Did Mr. Studer tell you that he  
24 was going to spend East River money for those  
25 purposes?

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1 A I don't recall specifically saying that. I  
2 know he was talking to him, but I don't recall  
3 specifically asking him finances.  
4 Q (By Mr. Herzog) Okay. Would he have needed  
5 approval to offer financial assistance?  
6 MR. ORR: Object to the form of the question.  
7 Lacks foundation. Exceeds the scope of phase one.  
8 A Generally, no.  
9 Q (By Mr. Herzog) Okay. He has a budget that he  
10 can use this for?  
11 MR. ORR: Same objections.  
12 A Yup.  
13 Q (By Mr. Herzog) Okay. Did you review any of  
14 the communications between Mr. Studer and Mr. Doak  
15 and his group --  
16 A Yes.  
17 Q -- at any time?  
18 A Yes.  
19 Q I'm sorry. I think you answered. Say again.  
20 I'm sorry.  
21 A Yes, during preparation.  
22 Q When?  
23 A Wednesday or Saturday.  
24 Q Okay. And had you seen them at any time before  
25 your preparation last Wednesday or last Saturday?

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1 MR. ORR: Object to the form. Exceeds phase  
2 one. Lack of foundation.  
3 MR. DIRENFELD: Same objection.  
4 A He told me some ideas he had.  
5 Q (By Mr. Herzog) Did he tell you that he  
6 intended to offer financial support to Mr. Doak and  
7 that group who was opposing East River's request for  
8 an exit charge number so it could consider whether  
9 or not to withdraw -- or Dakota Energy's request for  
10 an exit charge number so he could consider whether  
11 or not to withdraw from East River?  
12 MR. ORR: Same objections.  
13 A I have to ask what the question was again.  
14 That went a long time.  
15 Q (By Mr. Herzog) Mr. Boyko, did Mr. Studer share  
16 with you that he was planning to offer financial  
17 assistance to Mr. Doak and others who were opposing  
18 the efforts of Dakota Energy to obtain an exit  
19 charge number to determine whether or not it was in  
20 the best interests of Dakota Energy to withdraw as a  
21 member of East River? Did Mr. Studer tell you he  
22 was going to offer financial assistance for that  
23 purpose?  
24 MR. ORR: Object to the form. Lacks  
25 foundation. Exceeds the scope of phase one.

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1 MR. ORR: Object to the form of the question.  
2 A Not that I recall, I guess. There -- he might  
3 have shown me something, but I don't recall it.  
4 Q (By Mr. Herzog) You don't recall reviewing any  
5 of Mr. Studer's communications before you saw them  
6 in preparation for the deposition; is that fair?  
7 MR. ORR: Object to the form of the question.  
8 A Yes.  
9 Q (By Mr. Herzog) Okay. Did you, sir, have any  
10 communications with anyone at Basin about assisting  
11 Mr. Doak or others?  
12 MR. ORR: Object to the form.  
13 Q (By Mr. Herzog) You may answer, Mr. Boyko.  
14 A I would have probably given an update. That  
15 would be about it.  
16 Q To whom?  
17 A It probably would have been Paul Sukut.  
18 Q Okay. And what would the update have included?  
19 MR. ORR: Object to the form of the question.  
20 Exceeds phase one.  
21 MR. DIRENFELD: Same objection.  
22 A Basically, in general, what we were seeing the  
23 members do out there in the public.  
24 Q (By Mr. Herzog) And what -- what did you see  
25 the members doing out there in the public?

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1 A Their letters to the editor.  
2 Q Do you know whether Mr. Studer assisted in the  
3 preparation of those letters to the editor?  
4 MR. ORR: I'm going to object. This is way  
5 beyond the scope of phase one.  
6 MR. HERZOG: No, it's not. No, it's not. Your  
7 client is attempting to interfere in the governance  
8 of Dakota Energy, and if there's no right to  
9 withdraw, Mr. Orr, you don't have any reason to  
10 interfere in the governance of Dakota Energy.  
11 MR. ORR: Well, I object --  
12 MR. HERZOG: It's not beyond phase one. This  
13 goes directly to the question of why you were  
14 interfering in the governance of Dakota Energy if  
15 it's so clear that there's no right to withdraw. I  
16 will continue to ask my questions and if you want to  
17 instruct him not to answer, that's fine. We'll take  
18 it up with the Magistrate. Okay?  
19 MR. ORR: Let me just object. I totally  
20 disagree with the premise of your comments.  
21 Q (By Mr. Herzog) Are you aware of any effort on  
22 the part of Mr. Studer to encourage Mr. Doak and  
23 others to prepare a member petition for purposes of  
24 precluding this litigation?  
25 MR. ORR: Object to the form of the question.

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1 the bylaws of Dakota Energy to preclude this  
2 litigation?  
3 MR. ORR: Same objection. Instruct the witness  
4 not to answer. Happy to talk with counsel offline  
5 about it.  
6 Q (By Mr. Herzog) Are you aware of any  
7 correspondence -- strike that.  
8 Did you review any correspondence in  
9 preparation for your deposition in which Pat  
10 Doak and others asked for a recommendation from  
11 East River for an attorney to assist them? You  
12 may answer.  
13 MR. ORR: He may have lost audio.  
14 THE VIDEOGRAPHER: Looks like he lost his  
15 audio, so we might want to go off the record to  
16 correct that somehow.  
17 MR. ORR: Tom, can you speak again and let's  
18 see if we can hear you? I don't think he can hear  
19 us.  
20 MR. LUCE: I'll get my legal assistant in and  
21 see if we can figure out what the problem is.  
22 THE VIDEOGRAPHER: Can we go off the record to  
23 correct this?  
24 MR. HERZOG: Yes.  
25 MR. ORR: Yes.

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1 Exceeds phase one. I'll instruct the witness not to  
2 answer, but happy to talk offline with counsel about  
3 it.  
4 Q (By Mr. Herzog) Are you aware of any  
5 correspondence -- strike that.  
6 Did you review any correspondence in  
7 preparation for your deposition where  
8 Mr. Studer suggested to Mr. Doak the  
9 possibility of amending the bylaws to preclude  
10 the lawsuit?  
11 A I believe there was an e-mail to that extent,  
12 but I can't recall off the top of my head.  
13 Q Did -- did Mr. -- did East River assist  
14 Mr. Doak and others in identifying an attorney to  
15 represent Mr. Doak and others in an effort to amend  
16 the bylaws of Dakota Energy for purposes of  
17 precluding this lawsuit?  
18 MR. ORR: Object to the form of the question.  
19 Exceeds phase one. I'll instruct the witness not to  
20 answer, but happy to talk with counsel about it  
21 offline.  
22 Q (By Mr. Herzog) Are you aware of any  
23 recommendation to -- that was provided by East River  
24 to Mr. Doak and others about an attorney to  
25 represent Mr. Doak and others in an effort to amend

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1 THE VIDEOGRAPHER: We're going to go off the  
2 record shortly. We're off the record.  
3 (Recess taken.)  
4 THE VIDEOGRAPHER: Okay. We're back on the  
5 record. It's now 12:00 p.m. We are on the record.  
6 Q (By Mr. Herzog) I'm going to share my screen  
7 with you again, sir. So this is the document, it's  
8 number 14 again, Mr. Boyko, that we were looking at  
9 previously. And this is the one you said that you  
10 saw in preparation for your deposition; is that  
11 correct?  
12 A That's correct.  
13 Q All right. And do you remember when you saw  
14 that? Did you see that on Wednesday or on Saturday,  
15 sir?  
16 A I don't recall.  
17 Q Did you look at any documents on Saturday?  
18 A Yes.  
19 Q And did you look at documents on Wednesday?  
20 A Yes.  
21 Q Okay. And this says, Thank you -- we went over  
22 this before. Thank you you all so much for joining  
23 the call tonight. Do you see that, where I'm  
24 hovering with my cursor?  
25 A Yes.

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1 initiated that call?  
2 A No.  
3 Q Who did?  
4 A The manager.  
5 Q Who is the manager?  
6 A Char Hager.  
7 Q Okay. And who did he speak with?  
8 A It was a she. She talked to me.  
9 Q I'm sorry. Who did she speak with? You,  
10 Mr. Boyko?  
11 A Yes.  
12 Q Did she tell you that Mr. Oliver was prepared  
13 to be an adviser to Mr. Doak and his group?  
14 A No.  
15 Q So do you see the number two here that I've got  
16 my cursor hovering over? It says, Harvey would be  
17 able to answer your question, Jim, about legal  
18 considerations of people gathering with this group  
19 if there are any. Do you see that?  
20 A Yes.  
21 Q Do you have an understanding what Mr. Studer  
22 was referring to there?  
23 MR. ORR: Object. Calls for speculation.  
24 MR. HERZOG: Well, he's supposed to know about  
25 this stuff.

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1 times already this morning that you didn't call  
2 Mr. Studer to talk with him about anything in  
3 preparation for the deposition. Are you now telling  
4 me that you did?  
5 A Sir, when you asked me that, it was when the  
6 deposition started Wednesday. I don't know all  
7 these terms. I'm trying to get this as straight as  
8 possible for you.  
9 Q And I get it. I'm just asking you: You told  
10 me multiple times before that you haven't talked to  
11 Mr. Studer in preparation for your deposition and  
12 now I understand you to be testifying differently;  
13 is that correct?  
14 MR. ORR: Object to the form. Mischaracterizes  
15 his testimony.  
16 A I asked one question on number seven. I didn't  
17 share with him or anything else.  
18 Q (By Mr. Herzog) I'm not -- there's nothing  
19 wrong with you sharing it with him. I'm asking.  
20 Okay? Did you talk with Mr. Studer in preparation  
21 for your deposition testimony here today? Yes or  
22 no?  
23 MR. ORR: Object to the form of the question.  
24 A I asked him on one question.  
25 Q (By Mr. Herzog) So is that a yes?

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1 MR. ORR: Object, Counsel. He doesn't -- his  
2 knowledge doesn't have to extend to every line of  
3 every e-mail that was exchanged between East River  
4 and somebody else.  
5 Q (By Mr. Herzog) Do you know what Mr. Studer was  
6 referring to there?  
7 A I think he just gave Harvey's name to ask  
8 questions.  
9 Q Yeah, but it says, Answer your question, Jim,  
10 about legal considerations of people gathering with  
11 this group. Did you have an understanding of what  
12 Jim Propst had asked of Chris Studer?  
13 MR. ORR: Object to the form.  
14 A No, not specifically, no.  
15 Q (By Mr. Herzog) Did you call Mr. Studer and ask  
16 him about it? Did you ask him anything about this  
17 communication in preparation for your deposition  
18 today?  
19 A No. Not specifically, no.  
20 Q Is Mr. Studer --  
21 A Wait. Yes. Yes, I did. On one of these --  
22 one item.  
23 Q Which one?  
24 A Number seven.  
25 Q Now, Mr. Boyko, you've told me a number of

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1 A Yes. I asked him on one question, yes.  
2 Q Okay. Did you call him on the telephone and  
3 ask him about something?  
4 A No.  
5 Q Did you see him in person and ask him about it?  
6 A Yes. He stopped by my office.  
7 Q Okay. And is the only thing that you talked  
8 with Mr. Studer about what you referred to just a  
9 moment ago as number seven?  
10 A Yes.  
11 Q Okay. Didn't ask him about any other aspect of  
12 this document, just item number seven?  
13 A That's correct.  
14 Q Okay. And --  
15 A And to be fair, it was the issue in item number  
16 seven. It wasn't that question. It was just to  
17 make sure I understood the issue.  
18 Q And so if --  
19 MR. ORR: I think he was -- I'm not sure he was  
20 finished, Counsel.  
21 MR. HERZOG: Okay. I think he was.  
22 Q (By Mr. Herzog) If you're not, Mr. Boyko, go  
23 ahead and finish.  
24 A It was the issue surrounding seven, not the  
25 question itself is what I asked.

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1 Q Do you have it, sir?

2 A Yes.

3 Q All right. And is this a document that you

4 reviewed in preparation for your deposition?

5 A Yes, I did.

6 Q When you reviewed the documents in preparation

7 for your deposition, did they have those Bates

8 numbers on them, sir? The one at the --

9 A Did they have what?

10 Q -- lower right-hand corner.

11 A I don't know. No idea.

12 Q This is -- this document is another e-mail

13 exchange between Mr. Propst, Mr. Doak, and

14 Mr. Studer. And this one is from Jim Propst to

15 Mr. Doak and Mr. Studer calling to them separately.

16 And Mr. Propst says, ERC will garner most of the

17 support you refer to, Basin, et al. Did -- do you

18 know whether Mr. Studer told Mr. Propst that East

19 River would give Basin support for their effort?

20 MR. ORR: Object to form.

21 MR. DIRENFELD: Object to the form.

22 A I don't recall. I'm sure he said he's talked

23 to Basin, but that's all I know.

24 Q (By Mr. Herzog) Did Basin offer to contribute

25 funds to your knowledge to support Mr. Doak and his

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1 Q And it's an e-mail from Mr. Doak to Chris

2 Studer with a bunch of CCs, as you can see, and it

3 includes some information that had been passed along

4 by Mr. Studer. Do you see that?

5 A Yes.

6 Q All right. And do you see this little dash

7 that my cursor is hovering over where it talks about

8 a co-op attorney from Northern Electric?

9 A Yes.

10 Q And it says that a co-op attorney from the

11 Northern Electric area has pledged to help out the

12 concerned group of members from Dakota with any

13 legal advice, pro bono, things like getting

14 petitions together, if it gets to that point, and

15 other potential actions that the group might be able

16 to take. Do you see that?

17 A Yes.

18 Q Did Mr. Studer and you talk about the potential

19 for Mr. Doak's group to get a petition together?

20 MR. ORR: Object to the form of the question.

21 Exceeds the scope of phase one discovery. Hold on.

22 Could you state your question again? I may have

23 another -- or I may have another objection.

24 Q (By Mr. Herzog) Did you and Mr. Studer talk

25 about getting a petition -- helping the Doak group

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1 group

2 MR. ORR: Object to form.

3 A No, not -- no. No, not to my knowledge.

4 Q (By Mr. Herzog) Do you know if Mr. Studer asked

5 Basin if they would contribute funds to support

6 Mr. Doak and his group?

7 MR. ORR: Object to form.

8 MR. DIRENFELD: Object to form.

9 A Not to my -- not to my knowledge.

10 Q (By Mr. Herzog) Did you and Mr. Studer have any

11 conversation about him making such a request of

12 Basin?

13 MR. ORR: Object to the form.

14 MR. DIRENFELD: Object to the form.

15 A No, not to my knowledge.

16 Q (By Mr. Herzog) I'm going to show you another

17 document bearing the identifying numbers 52DEC

18 Member and 53DEC Member and so on.

19 MR. ORR: Is this number 18?

20 MR. HERZOG: This is number 18, Mr. Orr.

21 MR. ORR: Okay. Thank you.

22 Q (By Mr. Herzog) And this is an e-mail, if you

23 scroll to the top. Do you have that in front of

24 you, Mr. Boyko?

25 A Yes.

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1 get a petition together to address the lawsuit or

2 the withdrawal?

3 MR. ORR: Same objection. Exceeds the scope of

4 phase one, but I'll allow this answer. Object to

5 the form also.

6 A If I remember correctly, the members asked

7 Chris for some help and he told me about that.

8 Q (By Mr. Herzog) What did he tell you?

9 MR. ORR: Same objection. Go ahead.

10 A They would like some help on ideas on what to

11 do.

12 Q (By Mr. Herzog) And did Mr. Studer tell you

13 that he recommended a petition to amend the bylaws?

14 MR. ORR: Object to the form of the question.

15 A I don't recall that.

16 Q (By Mr. Herzog) Well, he -- he did. You know

17 that, don't you, because you saw it in a document

18 you reviewed in preparation for your testimony?

19 MR. ORR: Object to the form of the question.

20 MR. DIRENFELD: Object to the form.

21 A I saw that he talked about that with him. I

22 can't remember who brought it up.

23 Q (By Mr. Herzog) Mr. Studer helped them get a

24 petition to try to amend the bylaws, didn't he?

25 MR. ORR: I'm going to object to the form of



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1 the question and instruct the witness not to answer.  
2 This exceeds the limitations imposed by the Court on  
3 phase one discovery.  
4 Q (By Mr. Herzog) Mr. Studer told you that he had  
5 recommended a petition to amend the bylaws, didn't  
6 he, sir?  
7 MR. ORR: Same objection. Instruct the witness  
8 not to answer.  
9 MR. HERZOG: And just so I'm clear, Mr. Orr,  
10 the basis of your instruction is that this exceeds  
11 the scope of phase one?  
12 MR. ORR: It exceeds the scope of phase one and  
13 the limitation ordered by the Court with respect to  
14 the scope of phase one discovery.  
15 MR. HERZOG: That's all I wanted to know.  
16 MR. ORR: Right. And, I mean, I got other  
17 objections, too, but that's the basis for  
18 instructing him not to answer.  
19 MR. HERZOG: That's all I asked you, Mr. Orr,  
20 was the basis for the instruction. I don't care  
21 about the other objections.  
22 MR. ORR: Right. Just want to be clear.  
23 Q (By Mr. Herzog) Now, you said you didn't know  
24 whether there were Zoom calls or telephone calls;  
25 right? Do you remember that testimony?

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1 participated in the Zoom calls with Mr. Studer and  
2 Pat Doak's group?  
3 A I am not aware of anyone else.  
4 Q Did you ask Mr. Studer how frequently he had  
5 communications with Pat Doak's group in preparation  
6 for your deposition today?  
7 A No, just looked at his e-mails here.  
8 Q I'm going to show you what's been produced in  
9 the case pursuant to Magistrate Duffy's order as  
10 document 94DEC Member and 95DEC Member. Let me ask  
11 you this before I get to this: Were Chris Studer's  
12 e-mails searched as part of the discovery process in  
13 this case to produce documents that were requested?  
14 A I believe so, yeah. I believe, but I'm not  
15 sure.  
16 Q Did you review this document or e-mail in  
17 preparation for your deposition, sir? This is  
18 number 19, Mr. Boyko.  
19 A I got it. I don't remember reviewing this one.  
20 I believe so, but I just don't remember it.  
21 Q So do you see on page 94DEC Member, the e-mail  
22 from Chris Studer talking about the video from  
23 Mr. Felderman. Do you see that?  
24 A Yes.  
25 Q And it says, Full of half truths or

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1 A Yes, I do. Yeah.  
2 Q You reviewed this in preparation for your  
3 deposition last week; right?  
4 A Yes, I did.  
5 Q And in this document it says, I'll include  
6 information on another Zoom call for next Tuesday.  
7 Right? Do you see that?  
8 A That's correct.  
9 Q Do you know whether those Zoom calls were  
10 recorded or not, sir?  
11 A I don't believe so.  
12 Q Did you ask Mr. Studer in preparation for your  
13 deposition?  
14 A No.  
15 Q Did you ask Mr. Studer in preparation for your  
16 deposition whether he had recommended a petition to  
17 the members for purposes of amending the Dakota  
18 Energy bylaws?  
19 MR. ORR: Same objection. Instruct the witness  
20 not to answer.  
21 Q (By Mr. Herzog) Did you participate in any of  
22 the Zoom calls with Pat Doak and his group,  
23 Mr. Boyko?  
24 A No.  
25 Q Do you know whether anyone else from East River

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1 straight-out inaccuracies. Do you see that?  
2 A Yes. Yes.  
3 Q Did you ask Mr. Studer what the half truths or  
4 inaccuracies were?  
5 A I did not.  
6 Q Do you see here where I'm hovering my cursor  
7 again, Mr. Boyko, that second paragraph of Mr.  
8 Studer's e-mail where he says, Or maybe shoot a  
9 video interview if we would produce something? Do  
10 you see that?  
11 A Yes.  
12 Q And did you understand Mr. Studer to be  
13 offering for East River to produce a video on behalf  
14 of Pat Doak's group?  
15 MR. ORR: Object to the form. Exceeds the  
16 scope of phase one.  
17 Q (By Mr. Herzog) Go on.  
18 A He offered to produce a video.  
19 Q Did you talk to him about that in connection  
20 with preparing yourself to testify about  
21 communications with third parties?  
22 MR. ORR: Object to the form.  
23 A No, that -- I don't think we ever produced a  
24 video with the members, so I'm not --  
25 Q (By Mr. Herzog) Do you know?

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1 A -- aware of anything.  
2 Q Do you know?  
3 A To the best of my recollection, no, we did not.  
4 Q Did somebody tell you that?  
5 A No.  
6 Q How would you know?  
7 A Because I didn't see one out there.  
8 Q It doesn't mean -- it might mean you never  
9 released it, but it doesn't mean you didn't produce  
10 it; right?  
11 MR. ORR: Object. Argumentative.  
12 A There's always that possibility, but nothing I  
13 know of, I guess.  
14 Q (By Mr. Herzog) You don't know one way or the  
15 other, do you, sir?  
16 MR. ORR: Object to the form.  
17 A I'm not aware of producing any video.  
18 Q (By Mr. Herzog) We would have to ask Mr.  
19 Studer; right?  
20 A He would -- he would know that answer.  
21 Q I'm going to turn to document number 20. Do  
22 you see that in front of you? It's a document  
23 that's from Mr. Studer with the Bates label 60DEC  
24 Member and then a bunch of supporting stuff.  
25 A Yes.

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1 if Dakota Energy -- if this Court finds that there's  
2 a right to withdraw and Dakota Energy ultimately  
3 withdraws, that you're going to try to keep them  
4 from getting transmission rights?  
5 MR. ORR: Object to the form of the question,  
6 calls for speculation, hypothetical and a legal  
7 conclusion. You do not need to answer that  
8 question.  
9 MR. HERZOG: On what grounds?  
10 MR. ORR: Calls for a legal conclusion. It's  
11 hypothetical and exceeds the scope of phase one.  
12 Phase one is about whether they have the right to  
13 withdraw, not about conditions --  
14 MR. HERZOG: I'm asking him about a document  
15 that the Court ordered produced in phase one,  
16 Mr. Orr.  
17 MR. ORR: I understand that, but that doesn't  
18 mean every sentence in a document produced is  
19 relevant to phase one.  
20 Q (By Mr. Herzog) Are you -- is East River going  
21 to preclude Dakota from accessing transmission if it  
22 withdraws?  
23 MR. ORR: Object to the form of the question.  
24 That exceeds the scope of phase one. It calls for a  
25 legal conclusion and a hypothetical and I instruct

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1 Q Okay. Did you review this in preparation for  
2 your deposition?  
3 A I did look at this, yes.  
4 Q And it says, Dakota is not guaranteed  
5 transmission if they leave the East River  
6 membership. Do you see that?  
7 A Yes.  
8 Q And that was something that you've told to Pat  
9 Doak's group, wasn't it? Not you personally, sir,  
10 but that came from Mr. Studer and East River; right?  
11 MR. ORR: Object to the form of the question.  
12 A Yes.  
13 Q (By Mr. Herzog) And that was something that  
14 East River wanted to get out there to try to prevent  
15 Dakota from withdrawing as a member and even getting  
16 an exit charge, wasn't it?  
17 MR. ORR: Object to the form of the question.  
18 Exceeds the scope of phase one.  
19 MR. DIRENFELD: Object to form.  
20 A No, actually, Dakota was telling their  
21 membership that transition wouldn't change, they  
22 would have the same rates they do today. And their  
23 membership -- and I had asked Chris -- that's not  
24 right, is it? And so he explained it.  
25 Q (By Mr. Herzog) Okay. And are you saying that

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1 the witness not to answer.  
2 MR. HERZOG: What's the basis of the  
3 instruction?  
4 MR. ORR: Exceeds the limitation that the court  
5 imposed on phase one discovery.  
6 Q (By Mr. Herzog) What do you understand, in your  
7 role as the CEO of East River, Mr. Boyko, is a  
8 member's right to access transmission if they  
9 withdraw as a member?  
10 MR. ORR: Objection. You're just asking the  
11 same question a different way, Counsel.  
12 MR. HERZOG: I'm entitled to. You're not  
13 entitled to instruct him on this stuff and you know  
14 it. It's just bad faith.  
15 MR. ORR: No, it's not bad faith.  
16 MR. HERZOG: It is bad faith, Mr. Orr, and I'm  
17 sick and tired of it. These are documents that the  
18 Magistrate ordered produced in phase one and all  
19 you're doing is interfering in this examination and  
20 you've been interfering in it from the start of the  
21 deposition.  
22 MR. ORR: No. And I would ask you not to raise  
23 your voice with me, Counsel.  
24 MR. HERZOG: You're right on that. I  
25 apologize. I shouldn't have.

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1 letters to the editor, and he wrote the letter to  
2 the members, he was assisting Pat Doak's group in  
3 trying to stop the lawsuit? Yes or no?  
4 MR. ORR: Object to the form of the question.  
5 MR. DIRENFELD: Object to form.  
6 A He drafted a letter to the membership. He did  
7 provide some background information and he drafted  
8 this verbiage for a radio ad.  
9 Q (By Mr. Herzog) To try to help Pat Doak's group  
10 stop the lawsuit; correct?  
11 MR. ORR: Object to the form. Calls for  
12 speculation.  
13 MR. DIRENFELD: Object to form.  
14 A I say it over and over. This is what he gave  
15 him. It speaks for itself.  
16 Q (By Mr. Herzog) Well, you're no lawyer, sir.  
17 A That's right.  
18 Q You knew what he was doing and this was East  
19 River's effort to assist Pat Doak's group to stop  
20 the lawsuit? Yes or no? And I want a yes-or-no  
21 answer, please, or I want an explanation why you  
22 cannot answer the question yes or no.  
23 MR. ORR: Object to the form of the question.  
24 Asked and answered.  
25 MR. DIRENFELD: Object to form.

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1 Q Is this document one that you reviewed in  
2 preparation for your deposition today?  
3 A I believe so.  
4 Q Okay. I'm going mark this as Exhibit 6 to your  
5 deposition, sir. And here's Mr. Studer passing  
6 along the finalized versions of the special member  
7 meeting petitions and the instructions for the  
8 petition circulators. Do you see that?  
9 A Yes.  
10 Q Did Mr. Studer inform you that he had drafted  
11 the petitions pursuant to which Mr. Doak and his  
12 group would seek to amend the bylaws of Dakota  
13 Energy to preclude this lawsuit?  
14 MR. ORR: Object to the form.  
15 A No.  
16 Q (By Mr. Herzog) Were you aware that he did  
17 that?  
18 MR. ORR: Object to the form.  
19 A No.  
20 Q (By Mr. Herzog) You were not?  
21 A No, he didn't draft it.  
22 Q Who drafted them, sir?  
23 A Their attorney Harvey Oliver.  
24 Q So why was Mr. Studer passing them along?  
25 A He was just providing assistance, my

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1 A Again, we provided information and verbiage to  
2 the membership if they wanted to use to help stop  
3 the lawsuit.  
4 MR. HERZOG: Thank you.  
5 MR. ORR: Can we take a break? We've been  
6 going a little over an hour.  
7 MR. HERZOG: Yes, we can. Keep it short,  
8 please.  
9 MR. ORR: Sure.  
10 THE VIDEOGRAPHER: We're off the record at  
11 5:53 -- or excuse me. I'm sorry. 2:52.  
12 (Recess taken.)  
13 THE VIDEOGRAPHER: Okay. It's now 2:59 p.m.  
14 and we are back on the record, so we can proceed.  
15 Q (By Mr. Herzog) I'm going to share my screen  
16 again. I'm going to show you another document that  
17 was produced to us as a result of Magistrate Duffy's  
18 order and it bears the document numbers -- it's 26  
19 in the numerical list of the documents Mr. Luce  
20 provided you and it's 104DEC Member through 105.  
21 So here is what I'd like you to look at  
22 is -- this is from Mr. Studer dated March 26th  
23 2021. Good afternoon. Attached -- are you  
24 here with me, Mr. Boyko?  
25 A Yes.

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1 understanding.  
2 Q So he got these from Mr. Oliver and passed them  
3 along?  
4 A That's my understanding.  
5 Q Do you know whether Mr. Studer provided any  
6 input into the petitions?  
7 A I believe so, as far as review, but Harvey  
8 drafted it.  
9 Q Okay. And Mr. Oliver was not representing East  
10 River, was he?  
11 A He's representing the membership.  
12 Q What membership? He wasn't representing the  
13 membership?  
14 A All the energy members.  
15 Q He was representing Mr. Doak and his group;  
16 right?  
17 MR. ORR: Object to the form.  
18 Q (By Mr. Herzog) I can't hear you, Mr. Boyko.  
19 A The Dakota Energy members.  
20 Q Right. A handful of Dakota Energy members;  
21 right?  
22 A Of which East River is one.  
23 Q Right. Was he representing East River?  
24 MR. ORR: Object.  
25 A He was representing that handful.

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1 A Yes.  
2 Q Mr. Boyko, how did you know -- and who was on  
3 it, it was you and Mr. Dudke and who, Mr. Sahr?  
4 A I believe my general counsel.  
5 Q Is that Mr. Sahr?  
6 A Yes.  
7 Q Okay. You, Mr. Dudke and Mr. Sahr. Anybody  
8 else?  
9 A We had an attorney from Sutherland.  
10 Q Okay. Who?  
11 A I believe it was Peter. I don't remember his  
12 last name.  
13 Q Peter who?  
14 A Peter -- I don't remember his last name.  
15 Q How did you know who to call at RUS?  
16 A I don't know. Our attorneys lined it up.  
17 Q Okay. So Sutherland lined it up?  
18 A I think so. I don't recall exactly.  
19 Q Okay. And how long did the conversation last,  
20 approximately?  
21 A I don't remember. It was short. Five minutes,  
22 ten minutes.  
23 Q And what was the subject of the conversation?  
24 A Just in general, we're a borrower, what's their  
25 concern level --

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1 any possible claim for privilege. I just need to  
2 clarify something with Bob Sahr before we go  
3 forward, so let me do that. I'll be brief.  
4 MR. HERZOG: All right. Doug, I'm going to put  
5 myself on mute and run to the men's room real quick  
6 so we don't have to take another break. If James  
7 comes back, I'll be right back. Okay.  
8 THE VIDEOGRAPHER: We'll just stay on the  
9 record and keep rolling.  
10 MR. HERZOG: Okay.  
11 MR. LUCE: Mike Luce is, too.  
12 MR. ORR: I apologize for the interruption.  
13 Please proceed.  
14 Q (By Mr. Herzog) All right. So about six months  
15 ago you had a conversation with RUS; correct?  
16 A Yeah. Yeah, we did.  
17 Q And you called them to talk about the Dakota  
18 Energy request for buy-out?  
19 A About the lawsuit.  
20 Q And the request for a buy-out; right?  
21 A Well, it was about the lawsuit.  
22 Q What's the difference?  
23 A I don't know. Why are you asking it? There's  
24 a lawsuit --  
25 Q You keep quibbling with me whether it's a

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1 MR. ORR: I'm going to -- I'm going to -- let  
2 me object. I think I need to talk to the witness  
3 about this call. And I understand that -- I just  
4 need to make sure he's not inadvertently disclosing  
5 some attorney/client communication.  
6 MR. HERZOG: I mean, it's a conversation, James  
7 I'm not going to -- I'm not going to agree to this  
8 one. It's a conversation with RUS. There's no  
9 possible privilege that could apply.  
10 MR. ORR: Hold on. Hold up.  
11 MR. HERZOG: James, I don't want this time used  
12 against me.  
13 MR. ORR: Yes, I know. I'm trying to do it by  
14 text so that I don't break.  
15 MR. HERZOG: I see.  
16 MR. ORR: We won't count this against you. I  
17 appreciate your patience. I need to just call Bob  
18 Sahr, if I may, if we can just --  
19 MR. HERZOG: James, he testified about a  
20 conversation that he had on the telephone with RUS.  
21 MR. ORR: Right.  
22 MR. HERZOG: What possible claim to privilege  
23 could there be?  
24 MR. ORR: Okay. I just want -- I need to  
25 clarify something with Bob Sahr. There may not be

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1 lawsuit or the buy-out. The lawsuit requests a  
2 buy-out; right?  
3 MR. ORR: Object to the form of the question.  
4 A Well, we told them there's a lawsuit against us  
5 by Dakota Energy. I don't remember talking  
6 specifically on the buy-out.  
7 Q (By Mr. Herzog) Did you tell them what the  
8 lawsuit was about, Mr. Boyko?  
9 A I'm sure we did, I guess.  
10 Q Okay. And what did you tell them the lawsuit  
11 was about?  
12 A That Dakota wanted to get out of the contract.  
13 Q And what did RUS say?  
14 A Basically from what I recall, it wasn't big  
15 enough for them to get too concerned about and they  
16 left it there.  
17 Q Okay. And was there any memorialization of  
18 that discussion with RUS?  
19 A Not that I remember, no.  
20 Q Okay. And so you came away from that  
21 understanding that RUS wasn't terribly concerned  
22 about it given the size of Dakota Energy; true?  
23 MR. ORR: Object to the form.  
24 MR. DIRENFELD: Object to form.  
25 A They weren't concerned with the remaining loan



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1 portfolio they had with East River because of the  
2 size.  
3 Q (By Mr. Herzog) Did they tell you there's no  
4 right to withdraw or buy-out of your contract?  
5 A We didn't ask them that.  
6 Q Did they tell you that?  
7 A Not that I recall.  
8 Q And why wouldn't you ask them that question,  
9 Mr. Boyko?  
10 MR. ORR: Objection to the form of the  
11 question.  
12 MR. DIRENFELD: Object to form.  
13 A It's our contract with the member.  
14 Q (By Mr. Herzog) Yeah, but it's guaranteeing the  
15 RUS debt; right?  
16 A Yeah, that's why we talked to them.  
17 Q And -- right. And you understand that these  
18 contracts are financing instruments; right?  
19 MR. ORR: Object to the form of the question.  
20 Calls for a legal conclusion.  
21 Q (By Mr. Herzog) Go ahead, Mr. Boyko.  
22 A Understand they used the contracts to get the  
23 financing, yes.  
24 Q Okay. I mean, you know Duane Heile over at  
25 Tri-State, don't you?

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1 that woman that we talked to at RUS that said they  
2 weren't that concerned about it given the size of  
3 Dakota Energy? Did you do that?  
4 MR. ORR: Object to the form.  
5 A No.  
6 Q (By Mr. Herzog) Is there a reason you didn't do  
7 that?  
8 A We asked him if he contacted the lenders and he  
9 said yes.  
10 Q Well, you were on the phone call with RUS and  
11 you can't remember the name of the individual who  
12 you spoke with, and you didn't think that that might  
13 be of interest to us in discovery?  
14 MR. ORR: Object to the form of the question.  
15 A Actually, yeah, I don't remember who we talked  
16 to or if I was just briefed afterwards, no, I don't.  
17 Q (By Mr. Herzog) Now, wait a minute. You're  
18 changing your testimony again. Were you on the call  
19 or were you not on the call?  
20 A I -- I know the call took place. We -- we had  
21 talked -- we talked -- or staff at least talked to  
22 them and the result was they weren't concerned.  
23 Q Right.  
24 A I thought I was on. I honestly don't remember.  
25 Q Did you speak with anybody while we were

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1 A I think I met him once. That's about it.  
2 Q Mr. Heile testified they're financing  
3 instruments; right? Would you disagree with that?  
4 MR. DIRENFELD: Object to form.  
5 MR. ORR: Object to form.  
6 A I don't know what he testified, but I wouldn't  
7 disagree that they're financing instruments.  
8 Q (By Mr. Herzog) Okay.  
9 A They're more than that. They're contracts.  
10 Q Mr. -- so you don't recall the name of the  
11 individual that you spoke with at RUS?  
12 A No, I don't.  
13 Q Who would know the name?  
14 A Probably Dustin Zubke.  
15 Q Okay. Now, do you know how to get ahold of  
16 Dustin?  
17 A Yes.  
18 Q Okay. Do you see number two here, any  
19 discussion, whether oral or in writing, involving  
20 East River and any lender regarding any actual,  
21 potential, or proposed withdrawal or the terms of  
22 any actual, potential, or proposed withdrawal of any  
23 member from East River or Basin Electric? Did you  
24 call Mr. Dudke in preparation for your testimony  
25 here today and ask him, Hey, who was that fellow or

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1 waiting for Mr. Orr to get back to us about whether  
2 this was attorney/client privilege? Did you speak  
3 with Mr. Sahr or did you speak with Mr. Orr or Mr.  
4 Luce while we were waiting for him to return?  
5 A Yes. I saw them in the hallway on the way to  
6 the bathroom, but they did not direct me to do  
7 anything, no.  
8 MR. HERZOG: Fellas, that's just totally  
9 improper. That is completely and totally unethical  
10 and I'm going to raise it with the Court. I told  
11 you I didn't want you discussing this with the  
12 witness because of the problems that we've had  
13 previously with the witness changing his testimony.  
14 And you've got a witness on the stand, we are on the  
15 record, and one of you communicated with the witness  
16 in direct violation of my request.  
17 A They did not talk about this.  
18 MR. ORR: I disagree.  
19 Q (By Mr. Herzog) You just testified they did.  
20 A I said I saw them when I went to the bathroom.  
21 MR. HERZOG: This is a very, very troubling  
22 issue and I intend to raise it with the Magistrate.  
23 If you did not speak with Mr. Boyko, then please put  
24 that on the record because what he just testified to  
25 was that one of you communicated with him on his way

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1 to the restroom about a subject that was a current  
2 and pending question, we never went off the record  
3 and I specifically said I wasn't willing to go off  
4 the record because of my concern about prior  
5 testimony changing during breaks.  
6 MR. ORR: No, you didn't say that. I don't  
7 recall you saying that.  
8 MR. HERZOG: I did. I didn't say that. I said  
9 I'm not willing to have you go speak with the  
10 witness. I'm not going to agree to that. That's  
11 what I said. You told me you were talking to Bob  
12 Sahr.  
13 MR. ORR: Yeah, I did.  
14 MR. HERZOG: Okay. And if Mr. Sahr or Mr. Luce  
15 spoke with the witness, I'm taking it up with the  
16 Magistrate, and I want to know whether you did or  
17 you didn't.  
18 MR. HERZOG: Mr. Luce, did you speak with the  
19 witness?  
20 MR. LUCE: Yes, I saw him.  
21 MR. HERZOG: Did you speak with him?  
22 MR. LUCE: I just said I did. I saw him.  
23 MR. HERZOG: Okay. I'm going to take this up  
24 with the Magistrate?  
25 MR. LUCE: That's fine. We were on break as I

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1 It's 3:54 p.m. Please proceed.  
2 Q (By Mr. Herzog) Did you have any conversations  
3 with your attorneys during that break?  
4 A Yes, just briefly.  
5 Q With whom?  
6 A Just that I said, We're ready to go. I went to  
7 the bathroom. They met separately.  
8 Q Who did you have conversations with --  
9 A Bob Sahr.  
10 Q -- the most recent break?  
11 A Bob Sahr said we're ready to go.  
12 Q All right.  
13 A Out in the hallway.  
14 MR. ORR: Peter, can we -- I'd like to go --  
15 I'd like to clarify the prior break because I know  
16 you had concerns about that. When I asked for a  
17 break, I was aware that there was more than one  
18 phone call. And the sole purpose of communicating  
19 with Mr. Boyko was to make sure that there was no --  
20 no attorney/client communication was revealed. Some  
21 phone calls that related --  
22 MR. HERZOG: No, no, no. You can tell it to  
23 the Magistrate, too, Mr. Orr because we've done  
24 this. We did not go off the record at any time,  
25 specifically you knew that. You told me you were

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1 understood it.  
2 MR. HERZOG: No, we weren't on break, Mr. Luce.  
3 MR. LUCE: You were gone. I walked out  
4 wondering where everybody was and I saw him.  
5 MR. HERZOG: That's an absolute falsehood and I  
6 know you know, that, sir, because you were on --  
7 MR. LUCE: No, I don't know that and --  
8 (Crosstalk)  
9 MR. ORR: We're going to take a break. This  
10 has gotten too heated. We're going to take a break.  
11 MR. HERZOG: I'm taking it up with the  
12 Magistrate, Mr. Luce.  
13 THE VIDEOGRAPHER: Are we going to take a  
14 break, then? We're all in agreement?  
15 MR. ORR: Yes. Yes. We're going to take a  
16 five-minute.  
17 MR. HERZOG: Mr. Orr, it's only by agreement  
18 and I will agree to a five-minute break and that's  
19 it.  
20 THE VIDEOGRAPHER: Okay. Then we're taking a  
21 five-minute break. We're going off the record.  
22 It's 3:45.  
23 (Recess taken.)  
24 THE VIDEOGRAPHER: Okay. We're ready to go.  
25 Please standby. Okay. We're back on the record.

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1 talking to Mr. Sahr. I want to proceed with my  
2 deposition. I don't want to discuss this any  
3 further. You can put whatever information you want  
4 to put into your response to the Magistrate. Now, I  
5 am going to conduct the deposition of Mr. Boyko and  
6 I'm going to ask you to stop interfering in that  
7 examination.  
8 MR. ORR: I haven't been interfering, but  
9 please go ahead.  
10 Q (By Mr. Orr) Mr. Boyko, if we could turn please  
11 to number two of Exhibit No. 1. Any discussion,  
12 whether oral or in writing, involving East River and  
13 any lender regarding any actual potential or  
14 proposed withdrawal, is RUS a current lender of East  
15 River?  
16 A Yes.  
17 Q And you had a conversation with that lender RUS  
18 about the potential withdrawal of Dakota Energy;  
19 fair?  
20 MR. ORR: Object to the form.  
21 A We had a question about the lawsuit, yes.  
22 Q (By Mr. Orr) Okay. And the lawsuit involves  
23 the potential withdrawal. Why do you keep quibbling  
24 with me about that, Mr. Boyko? Do you think the  
25 lawsuit has something to do with -- with something

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1 that's -- if they think that's discouraging, that's  
2 a different interpretation.  
3 Q (By Mr. Herzog) Do you agree or disagree that  
4 East River members are entitled to information that  
5 would allow them to estimate an exit charge  
6 calculation?  
7 MR. ORR: Object to the form. Calls for a  
8 legal conclusion.  
9 Q (By Mr. Herzog) You can answer.  
10 A They're entitled to our financial information.  
11 And Basin, we provide that every month, if that's  
12 what you're asking.  
13 Q No. Do you agree or disagree that they're  
14 entitled to information that would allow them to  
15 estimate an exit charge calculation?  
16 MR. ORR: Object to form.  
17 A I don't know what information -- I don't know  
18 what information you're talking about.  
19 Q (By Mr. Herzog) You can't figure that out?  
20 MR. ORR: Object to form.  
21 A They have access to all of our financial  
22 information, what else are you asking?  
23 Q (By Mr. Herzog) Well, what would it cost to  
24 buy-out of the contract?  
25 A Well, that would be --

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1 A I just -- I read the termination provisions.  
2 You have to get all your -- meet all your contract  
3 requirements.  
4 Q (By Mr. Herzog) Right. But are you relying on  
5 anything other than this in your review of the  
6 termination provision?  
7 MR. ORR: Same objection.  
8 A Yeah. The rest would be attorney/client.  
9 Q (By Mr. Herzog) Did you see any of the  
10 information that was provided to Basin by its  
11 general counsel or its outside counsel on this  
12 issue?  
13 MR. ORR: Object to the extent -- object to the  
14 extents it's covered by the JDA.  
15 A This -- the only discussions we had on this  
16 were in the JDA meetings. That's all I had.  
17 Q (By Mr. Herzog) Okay. Let me -- let me just  
18 focus on this whereas clause of Exhibit No. 7 to  
19 your deposition. It says, Whereas, the  
20 cooperative -- and you understand that's referring  
21 to Basin; right?  
22 A Yes.  
23 Q Has been advised by both its general counsel  
24 and its outside counsel, Orrick Herrington and  
25 Sutcliff, that the all requirements contracts of

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1 MR. ORR: Object to the form.  
2 A It's not allowed.  
3 Q (By Mr. Herzog) Okay. It's not allowed. So  
4 let me mark for identification as Exhibit 7 this  
5 document from Mr. Sukut. And am I saying that  
6 right? Sukut?  
7 A Sukut, yes.  
8 Q He was the general manager and CEO of Basin,  
9 correct?  
10 A Correct.  
11 Q And this is a -- this is a letter that he sent  
12 to all class A members. And East River is a class A  
13 member, is that correct?  
14 A That's correct.  
15 Q Okay. And Mr. Sukut provided a resolution that  
16 had been passed by Basin, correct?  
17 A Correct.  
18 Q And you're familiar with this, you read this in  
19 preparation for your deposition today, didn't you?  
20 A Correct.  
21 Q Are you relying on anything other than this in  
22 your conclusion that the WPC between East River and  
23 Dakota Energy doesn't permit any early termination?  
24 MR. ORR: Object to the extent it calls for  
25 revealing attorney/client communication.

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1 both the class A members with the cooperative and  
2 the class C members with the class A members do not  
3 contain any provision permitting the member to  
4 buy-out of its all requirements contract with the  
5 cooperative or the class A member as applicable. Do  
6 you see that?  
7 A Yes.  
8 Q Was any information from Basin's general  
9 counselor its outside counsel provided to you or to  
10 East River to support this conclusion?  
11 MR. ORR: Object, I believe the witness has  
12 said that would be covered by the JDA and it's  
13 privileged.  
14 Q (By Mr. Herzog) I didn't ask him what it was, I  
15 asked him whether it was communicated?  
16 MR. ORR: Same objection.  
17 Q (By Mr. Herzog) You can answer, Mr. Boyko?  
18 A Any communications we had on that were covered  
19 by the JDA.  
20 Q You know, you can repeat what your counsel  
21 says, Mr. Boyko, but I'm entitled to an answer. Did  
22 you receive opinions from Basin's general counselor  
23 or Rick on this issue, whether, I didn't ask you  
24 whether what the opinions were, I asked you whether  
25 they shared them?

# EXHIBIT E

**In The Matter Of:**  
*Dakota Energy Cooperative, Inc. v.*  
*East River Electric Power Cooperative, Inc., et al.*

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*James Ryken*  
*September 22, 2021*  
*Rough Draft*

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*Pat Beck, Court Reporter*

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1 this letter before you signed this?  
2 A I don't recall.  
3 Q In preparation for your deposition today, did  
4 you do anything to refresh your recollection of --  
5 did you do anything to refresh your recollection of  
6 the topics that are included in this letter?  
7 MR. ORR: Object to form.  
8 A No.  
9 Q (By Mr. Neckers) Does this letter contain your  
10 own opinions or thoughts about the Dakota request  
11 for a buy-out or does it contain the thoughts and  
12 opinions of others?  
13 MR. ORR: Object to form.  
14 A It has the opinion of the board and so, yes, it  
15 has my opinion in it.  
16 Q (By Mr. Neckers) In your view, this letter  
17 contains the opinion of the board of directors of  
18 East River?  
19 A Yes, I was authorized to sign the letter on  
20 behalf of the board.  
21 Q Was there a specific board resolution to that  
22 effect?  
23 A I'm not sure.  
24 Q Do you recall either way as to whether there  
25 was an affirmative vote of the East River board of

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1 MR. ORR: Objection. You doesn't have to  
2 assume. And let me just caution you not to reveal  
3 anything that may have been discussed in executive  
4 session with counsel.  
5 Q (By Mr. Neckers) Go ahead.  
6 A As far as I know, there was discussion held and  
7 I was authorized to sign the letter.  
8 Q Was there discussion held in an executive  
9 session or during the regular board meeting?  
10 A Executive session.  
11 Q And do you remember -- who attends the  
12 executive sessions of the board meetings at East  
13 River?  
14 MR. ORR: Object to form.  
15 A Depends on the situation. Most of the time the  
16 manager and, of course, the attorney and then  
17 appropriate senior staff.  
18 Q (By Mr. Neckers) And so you sent this letter on  
19 behalf of the East River board to Garry Dearborn who  
20 is the president of Dakota Energy Cooperative at the  
21 time, right?  
22 A Yes.  
23 Q When you -- and I take it you wouldn't have  
24 signed this letter if you didn't think it was  
25 accurate, right?

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1 directors authorizing you to send this letter?  
2 A I don't recall.  
3 Q Would it -- based on your general practice  
4 working on the board at East River for the last 23  
5 or so years, would it have been, in your mind,  
6 within your authority as board president to send  
7 this letter absent an affirmative vote of the  
8 directors?  
9 MR. ORR: Object to form.  
10 A Probably not, no.  
11 Q (By Mr. Neckers) Do you remember if -- do you  
12 remember attending a board meeting then or having a  
13 written consent authorizing you to send this letter?  
14 A I don't recall.  
15 Q Mr. Ryken, I'm not suggesting that you did  
16 anything wrong here, just to be clear. I'm just  
17 trying to understand the process that went into  
18 writing and sending out this letter. Okay?  
19 So what else do you recall, if anything,  
20 about the process by which this letter and its  
21 contents were drafted?  
22 A We had a board meeting around -- you know, I  
23 don't know what day of the week March 7th is, but  
24 sometime the first Thursday in March we would have  
25 had a meeting. I'm just assuming --

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1 A Correct.  
2 Q When you signed this letter, what was the basis  
3 for your belief that the wholesale power contract  
4 between East River and Dakota Energy does not  
5 provide for a buy-out as you indicated in this  
6 letter?  
7 MR. ORR: Object to the extent it calls for  
8 revealing attorney/client communication.  
9 A The discussion was held during executive  
10 session and --  
11 MR. ORR: Mr. Ryken, and let me just be clear  
12 that Mr. Neckers is not asking you about discussions  
13 that occurred in executive session because those  
14 were attorney/client privilege and so you're not to  
15 -- you're not to talk about discussions that were  
16 held in that -- those executive sessions because it  
17 would reveal attorney/client communications.  
18 Q (By Mr. Neckers) Mr. Ryken, do you have any  
19 basis for the statement that is the last sentence in  
20 the first full paragraph on the second page of your  
21 letter for your conclusion that the wholesale power  
22 contract doesn't provide for a buy-out other than  
23 information you learned during executive session?  
24 A No.  
25 Q So to be clear, the conclusion that is in your



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1 letter that the wholesale power contract between  
2 East River and Dakota does not provide for a buy-out  
3 is based only on information that came out of or was  
4 discussed in executive session, is that correct?

5 MR. ORR: Object to the form.

6 A Yes.

7 Q (By Mr. Neckers) Were you relying on anything  
8 else other than that information that I'm not going  
9 to ask you about that came out of executive session  
10 when you signed your name to the letter offering the  
11 conclusion that the supplemental wholesale power  
12 contract does not contain a buy-out provision?

13 A No.

14 Q Has that been your position as the president of  
15 the board at East River all along since the day that  
16 Dakota Energy provided to East River its resolution  
17 asking for a buy-out figure?

18 MR. ORR: Object to the form.

19 A Yes.

20 Q (By Mr. Neckers) In other words, it's been your  
21 position all along, Mr. Ryken, as the president of  
22 the board at East River that East River has no  
23 obligation whatsoever to provide Dakota Energy with  
24 a buy-out number, correct?

25 MR. ORR: Object to the form. Calls for a

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1 legal conclusion.

2 A Yes.

3 Q (By Mr. Neckers) Attached to that letter -- to  
4 your letter of March 7th, 2019, to Dakota Energy was  
5 a letter from Basin and its CEO to class A members  
6 forwarding a resolution that Basin passed as well,  
7 right?

8 A Yes.

9 Q When was the first time you heard about Basin's  
10 resolution and this letter dated February 15th,  
11 2019?

12 A Around that time.

13 Q Tell me what you remember about that.

14 A They adopted a resolution at the Basin board  
15 meeting that didn't allow buying out of an  
16 all-requirements contract.

17 Q Did you have -- other than in executive  
18 session, did you have any discussions with anyone  
19 about that Basin resolution?

20 A Not that I recall.

21 Q You didn't discuss it with Mr. Boyko or the  
22 other staff at East River?

23 A Only if Bob was around, Mr. Sahr.

24 Q Bob Sahr?

25 A Yes.

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1 Q Did you discuss the resolution with Clay Union  
2 Electric?

3 A I may have mentioned that Basin passed a  
4 resolution, but we didn't discuss it.

5 Q I'm flipping now to the fourth page of tab 20,  
6 which was attached to your letter. This is a copy  
7 of the resolution that was passed by the Basin  
8 board, is that right?

9 A Yes.

10 Q Do you remember when the first time it was that  
11 you saw this document, sir?

12 A I don't recall.

13 Q Would it have been around the time that it  
14 passed in February of 2019?

15 A Yes.

16 Q Did you rely on this resolution and the  
17 information contained in here for purposes of  
18 forming your own understanding as to whether there  
19 was a right to withdraw from East River?

20 A Yes.

21 Q Did you personally have any discussions with  
22 anyone from Basin about this resolution specifically  
23 or the topics discussed in this resolution?

24 A No.

25 Q So you understood -- and this was a resolution

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1 that was forwarded to you by somebody at East River,  
2 is that right?

3 A Yes.

4 Q Or did you receive this directly from someone  
5 at Basin, Mr. Ryken?

6 A I did not get it from Basin.

7 Q Okay. And in the ordinary course of business,  
8 I take it you'd receive documents like this from  
9 people at East River as opposed to from employees or  
10 representatives of Basin itself, is that fair?

11 MR. DIRENFELD: Object to form.

12 A Yes.

13 Q (By Mr. Neckers) Okay. Would you look at the  
14 third paragraph of this document that I will -- I  
15 was going to try and highlight it, but I won't do  
16 that. You see the third paragraph beginning,  
17 Whereas, the cooperative has been advised by?

18 A I see it.

19 Q And it goes on to say, The cooperative has been  
20 advised by both its general counsel and its outside  
21 counsel, Orrick Herrington & Sutcliffe, LLP, that  
22 the all-requirements contracts of both the class A  
23 members with the cooperative and the class C members  
24 with the class A members do not contain any  
25 provision permitting the member to buy-out of its